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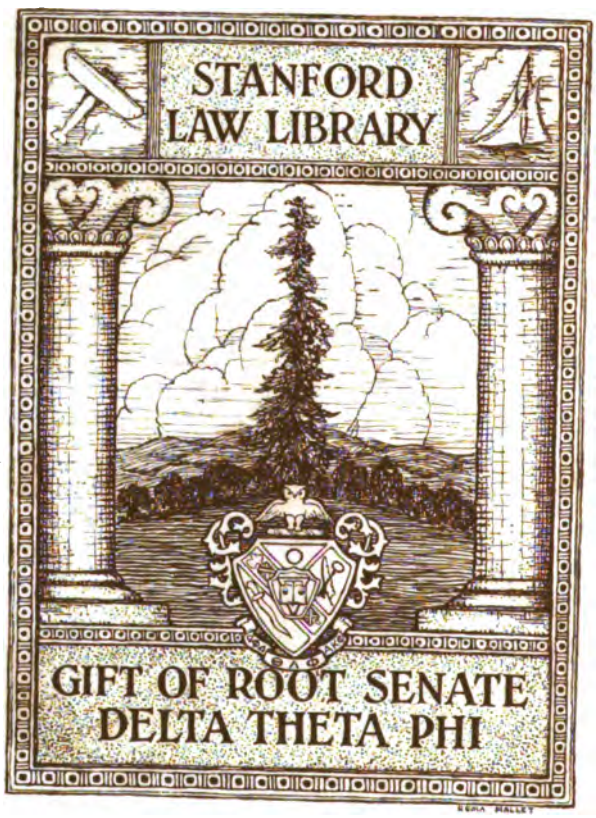
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A TREATISE

ON

MARITIME LAW.

INCLUDING

4155

THE LAW OF SHIPPING; THE LAW OF MARINE INSURANCE;
AND THE LAW AND PRACTICE OF ADMIRALTY.

BY

THEOPHILUS PARSONS, LL.D.,
DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY; AND AUTHOR OF TREATISES
ON THE LAW OF CONTRACTS; THE ELEMENTS OF MERCANTILE LAW;
AND THE LAWS OF BUSINESS FOR BUSINESS MEN.

IN TWO VOLUMES.

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BOOK II.

ON THE LAW OF MARINE INSURANCE.

John Jay DuBois
Yale College '67
Columbia Coll. L.S. '69

A TREATISE

ON THE

LAW OF MARITIME PROPERTY AND CONTRACTS.

BOOK II.

ON THE LAW OF MARINE INSURANCE.

CHAPTER I.

WHAT INSURANCE IS AND HOW IT IS EFFECTED.

SECTION I.

IN WHAT MANNER AND BY WHOM THE CONTRACT OF INSURANCE MAY BE MADE.

By the contract of Marine Insurance the insurer, for a consideration which is called a premium,[1] undertakes to indemnify the insured, against loss on property arising from perils, the property and the perils being both defined by the instrument of agreement, aided by the law.[2] Insurers are under no obligation

[1] See post, ch. 5.

[2] See Le Guidon, chap. 1, art. 1; Emerigon, chap. 1, Meredith's ed., p. 2; Roccus, Ingersoll's Ed., 85.

to insure for all who offer, and it has been held that an action will not lie against them for combining to refuse to insure for a certain person, however malicious their motive may be.[1] But this question would depend somewhat, if the insurance was sought to be effected of an incorporated company, upon the nature of its charter, which, however, generally only gives the power, but does not compel the company to make insurance for all who offer.

A. *Of the Parties to the Contract.*

It may be made, generally, by any parties competent to enter into any contract. The principal exception in practice is an alien enemy, in whose favor no contract of insurance can usually be enforced in our courts. An insurance for his benefit, or to cover any property or interest belonging to him, is void.[2] And

[1] Hunt *v.* Simonds, 19 Mo. 583.

[2] The doctrine at one time prevailed in England, supported by the great authority of Lord *Mansfield*, that it was lawful to insure an enemy's property. Planche *v.* Fletcher, 1 Doug. 251; Lavabre *v.* Wilson, id. 284; Thellusson *v.* Fergusson, id. 361; Eden *v.* Parkison, 2 id. 732; Bermon *v.* Woodbridge, id. 781; Tyson *v.* Gurney, 3 T. R. 477; Henkle *v.* Royal Exch. Ass. Co. 1 Ves. sen. 317; Gist *v.* Mason, 1 T. R. 84. It would seem, however, that the question of the legality of such insurances was never fairly met and decided by Lord *Mansfield*, as is shown by what fell from *Buller*, J., in Bell *v.* Gilson, 1 B. & P. 345, 354. "When," says he, "the case of Gist *v.* Mason came on, I more than once conversed with Lord *Mansfield* on the subject, being desirous to obtain his opinion on the legality of such insurances. On the legality, however, I never could get him to reason. He often said that in former times it was considered for the interest of the country to insure enemy's property, and on the persuasion of its being for the interest of the country, he always discountenanced any objection on that head. But he never went beyond the ground of expedience." It was supposed that the country would gain more by the payment of premiums to the insurers, than it would lose by the payment of losses to the assured. Two temporary acts of parliament, applying only to existing wars, have made such insurances illegal. 21 Geo. 2, c. 4; 33 Geo. 3, c. 27, § 4. The courts of law, however, since the time of Lord *Mansfield*, have established by a long course of decisions the doctrine that all insurance of an enemy's property is illegal. The cases of Brandon *v.* Nesbitt, 6 T. R. 23, and Bristow *v.* Towers, id. 35, decided that no action could be maintained on a policy of insurance, by or in favor of an alien enemy. The question of the legality of such insurances, though raised and ably argued by counsel, especially in the latter case, was not decided by the court. The precise question was raised in Furtado *v.* Rodgers, 3 B. & P. 191, and such insurance was held to be void because illegal. See also, Kellner *v.* Le Mesurier, 4 East, 396; Gamba *v.* Le Mesurier, 4 East, 407. The case of Brandon *v.* Curling, 4 East, 410, must be regarded as extending the doctrine still further. In this case insurance was effected on goods shipped on board a neutral ship, on account

it is the exclusive right of every government to determine who are its public enemies. And if a citizen's property, which is within the territories of a foreign nation when that nation becomes a public enemy, is brought from thence while the war continues, it is presumed to be a trading with the enemy,[1] unless

and at the risk of Frenchmen before war was declared between Great Britain and France. The goods were exported during the war and were captured at sea by a co-belligerent, and Lord *Ellenborough*, C. J., laid down the rule, and the case was decided upon the ground, "that, where the insurance is upon goods generally, a proviso to this effect shall in all cases be considered as engrafted therein, namely, 'provided that this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and the assurer.'" It may be laid down that every insurance entered into in time of war of enemy's property is absolutely void, as illegal; and that the effect of a subsequent war is at least entirely to suspend the contract during the continuance of the war; and perhaps to completely avoid it. See Griswold *v.* Waddington, 15 Johns. 57, 16 Johns. 438; The Hoop, 1 Rob. Adm. 196, 201. See also, Le Guidon, chap. 2, art. 5; Emerigon, chap. 4, sec. 9, Meredith's ed., 103; 2 Valin, liv. 3, tit. 6, art. 3; Du Ponceau's Bynkershoek, chap. 21. Where the assured becomes an alien enemy after the happening of a loss, the remedy is merely suspended during the existence of the war, and his right may be enforced upon the return of peace. Flindt *v.* Waters, 15 East, 260. For exceptions to the rule that no contract with an alien enemy is valid, see, as to ransom bills, Ricord *v.* Bettenham, 3 Burr. 1734; Cornu *v.* Blackburne, 2 Doug. 641; Goodrich *v.* Gordon, 15 Johns. 6; Per Chancellor *Kent*, Griswold *v.* Waddington, 16 Johns. 438, 451; Per Sir *William Scott*, The Hoop, 1 Rob. Adm. 196, 201; Per *Washington*, J., in Crawford *v.* The William Penn, 3 Wash. C. C. 484, 492; and as to bills drawn in an enemy's country and indorsed to an alien enemy by and for the subsistence of a prisoner of war, Antoine *v.* Morshead, 6 Taunt. 237. The remedy, however, upon such contracts would be suspended during the continuance of a war. The actions in Ricord *v.* Bettenham, and Cornu *v.* Blackburne, were brought in the names of the aliens. It is true that, in the former case, as is said by Lord *Kenyon* in Brandon *v.* Nesbitt, 6 T. R. 23, the action was not brought until peace was restored, and the objection of the plaintiff being an alien enemy was thus got rid of; but the latter case was brought during the continuance of the war. There seems to be no reason why the general principle that trading with an enemy during the continuance of a war is illegal, should not apply to the contract of insurance. Speaking of this principle Mr. Justice *Story* said: "It has grown hoary under the reverent respect of centuries, and cannot now be shaken, without uprooting the very foundations of national law." The Cargo of the Ship Emulous, 1 Gallis. 563, 571. See also, Potts *v.* Bell, 8 T. R. 548; Willison *v.* Patteson, 7 Taunt. 439.

[1] The Hoop, 1 Rob. Adm. 196; The Elizabeth of Ostend, cited 1 Rob. Adm. 202; The Juffrow Louisa Margaretha, cited 1 Rob. Adm. 203, 8 T. R. 557, 1 B. & P. 349, n.; The St. Phillip, cited 8 T. R. 556; The Brig Mary, 1 Gallis. 620; The Rapid, 1 Gallis. 295, 8 Cranch, 155; The Ship St. Lawrence, 1 Gallis. 467, 9 Cranch, 120; The Alexander, 8 Cranch, 169. See also, The Brig Joseph, 1 Gallis. 545. In regard to the right of a citizen in a foreign country to remove his goods immediately after war breaks out, see post, p. 15, n. 3. The case of The Madonna delle Gracie, 4 Rob. Adm. 195, has been supposed to countenance the doctrine that if a license might be obtained,

he has ordered the goods before the war and had no means of countermanding the order afterwards.[1] But transactions with an enemy, which are not voluntary but the result of a strict necessity, are not illegal.[2] A hull has the national character of her flag,[3] but this does not determine the nationality of the cargo.[4]

A trade or a transaction is sometimes made legal by a license given to a party who otherwise would have had no right to carry it on. This license may be "to any person possessing it,"[5] — or

it would be the same as if it had been, and the cargo would be protected. This has arisen from the following expression: "The circumstances of this case may be taken as virtually amounting to a license; inasmuch, as if a license had been applied for, it must have been granted." But this case was decided on its peculiar circumstances. The claimant was a British consul, who had not acted as a merchant, but had bought the cargo in question for the British government, to supply its fleets. It will be seen, therefore, that the case is not an authority to the point that a citizen may, after war has broken out, bring home his goods without a license.

[1] The Juffrow Catharina, 5 Rob. Adm. 140. In the case of The Merrimack, 8 Cranch, 317, the goods were purchased by British merchants in England, in pursuance of orders from American citizens, before the war between the United States and Great Britain commenced. After it broke out they were shipped to the agent of the British merchants in this country, who was an American citizen, "on account and risk of an American citizen." Held, that they were not liable to condemnation.

[2] Jenks *v.* Hallet, 1 Caines, 60; Hallet *v.* Jenks, 3 Cranch, 210, 1 Caines Cas. 43. The action was upon a policy of insurance, on a vessel from Hispaniola to St. Thomas. The vessel, while on a voyage from Newport in Rhode Island to Havana, was compelled to put into Hispaniola, a country in the possession of France. The cargo was landed in order that the vessel might be repaired, and was prevented from being reloaded by the government. It was sold, and the cargo on board at the time of the seizure was bought with the proceeds. By an act of congress passed June 13, 1798, all commercial intercourse between the United States and France, and the dependencies thereof, was prohibited. The vessel was captured by a British frigate, and the assured claimed as for a total loss. Held, that under the circumstances the voyage was not illegal so as to avoid the insurance.

[3] The Vrow Elizabeth, 5 Rob. Adm. 2; The Primus, Eng. Adm. 1854, 29 Eng. L. & Eq. 589; The Industrie, Eng. Adm. 1854, 33 Eng. L. & Eq. 572.

[4] The Vreede Scholtys, 5 Rob. Adm. 5, note; The Primus, cited *supra*.

[5] It has been much disputed in England whether the property of an alien enemy is protected by a license, in which the grantees are described in general terms. In The Hoffnung, 2 Rob. Adm. 162, Sir *William Scott*, after stating that the king might give an enemy liberty to import, said: "But I apprehend, that unless there are very express words to this effect to be found in the license, I am to consider its meaning as not going to that extent, but as giving such a liberty only to subjects of this country; it is a license 'to British subjects' to import, &c., and as I understand it, they are to import on their own account, and if it appeared that the importation was on the account of other than British merchants, I should hold, that under the terms of this license, it could not be considered a legal importation." See also, The Beurse Van Koningsberg,

otherwise be made transferable; but if not so made it is personal only,[1] and it will be fairly but yet accurately if not strictly construed as to all its indulgences.[2] And it must be a license from our own government; for the mere sailing under an enemy's license constitutes an act of illegality.[3] Nor will a pretended

2 Rob. Adm. 169. A license to P. B. & C. (who were in fact British merchants), on behalf of themselves and others, to export goods on a certain vessel bearing any flag except the French, was held by the King's Bench not to warrant an export of goods, which were at the time of shipment the property of an alien enemy. See also, to the same point, Flindt *v.* Scott, 15 East, 525. This case was reversed in the Exchequer Chamber, 5 Taunt. 674. And it may now be considered as settled, that the property of an enemy is protected by such a license. Robinson *v.* Touray, 1 M. & S. 217; Hullman *v.* Whitmore, 3 id. 337; Fayle *v.* Bourdillon, 3 Taunt. 546; Morgan *v.* Oswald, id. 555; Feise *v.* Bell, 4 Taunt. 4; Schnakoneg *v.* Andrews, 5 Taunt. 716; Usparicha *v.* Noble, 13 East, 332. See also, Hagedorn *v.* Bazett, 2 M. & S. 100; Warin *v.* Scott, 4 Taunt. 604; Feise *v.* Newnham, 16 East, 197.

[1] Busk *v.* Bell, 16 East, 3; Barlow *v.* M'Intosh, 12 id. 311; Grigg *v.* Scott, 4 Camp. 339; Feize *v.* Thompson, 1 Taunt. 121.

[2] Sir *William Scott*, in the case of The Cosmopolite, 4 Rob. Adm. 8, 11, said: "Licenses being then high acts of sovereignty, they are necessarily *stricti juris*, and must not be carried further than the intention of the great authority which grants them, may be supposed to extend." See also, The Juno, 2 Rob. Adm. 116; The Goede Hoop, Edw. Adm. 328. In this last case the old doctrine was very much modified. The following was laid down by Sir *William Scott* as the guide for the court in this and subsequent cases: "They are not mere matters of special and rare indulgence, but are granted with great liberality to all merchants of good character, and are expressed in very general terms; requiring, therefore, an enlarged and liberal interpretation. At the same time they are not free from control; restrictions dictated by prudent caution are annexed, and where they are so annexed, those restrictions must be supposed to have an operative meaning. It is not, therefore, in the power of this court to apply such an interpretation to a license as would be in direct contradiction to its express terms, or to say that effect should be given to one part and not to another. If the permission is for a ship to go in ballast, it would be impossible for the court to say that it shall go with a cargo; for that would be not an interpretation, but a contravention of the license. But where it is evident that the parties have acted with perfect good faith, and with an anxious wish to conform to the terms of the license, I presume that I am only carrying into effect the intent of the grantor, when I have recourse to the utmost liberality of construction, which it is in the power of this court to apply. As a general rule, therefore, it is to be understood, that where no fraud has been committed, where no fraud has been meditated, as far as appears, and where the parties have been prevented from carrying the license into literal execution by a power which they could not control, they shall be entitled to the benefit of its protection, although the terms may not have been literally and strictly fulfilled." See also, Flindt *v.* Scott, 5 Taunt. 674; Klingender *v.* Bond, 14 East, 484, and cases ante, p. 6, n. 3.

[3] The Anna Catharina, 4 Rob. Adm. 107; The Julia, 8 Cranch, 181; The Aurora, id. 203; The Hiram, 1 Wheat. 440; The Ariadne, 2 Wheat. 143; Craig *v.* United States Ins. Co., Pet. C. C. 410. It has been held, in Connecticut, that if the insured obtain such a license through the minister of the neutral power, to a port of whose country the vessel is going, the voyage is not illegal. Bulkley *v.* Derby Fishing Co.,

sale prevent adjudication according to real ownership.[1] The fraudulent alteration of a license destroys its validity, even where the person claiming protection is innocent of the fraud.[2] And a wrong description invalidates a license, as where a person is described as of London, merchant, when he resides elsewhere, although he intended to go to London and settle there.[3] The defence of "alien enemy" is one which is not favored by the law,[4] and it has been said that the plea must not only aver such hostile character but also must set forth every fact that negatives the plaintiff's right to sue.[5] But it has been shown by Mr. Justice *Story* that this position is not sustained by authority, the true rule being that every fact must appear upon the record which negatives the right of the alien to sue.[6]

Alien friends may be parties to contracts of insurance as fully, to all intents and purposes, as citizens or subjects of the country where the policy is made. And an alien enemy in a country at war with his own, may have rights and privileges which the courts of that country may enforce;[7] and if an alien has a

1 Conn. 571. This decision is not in conformity, however, with those above cited. The same may be said of Perkins *v.* N. E. Mar. Ins. Co., 12 Mass. 214; Hayward *v.* Blake, id. 176. See Ogden *v.* Barker, 18 Johns. 87; Colquhoun *v.* N. Y. Firem. Ins. Co., 15 id. 352.

[1] The Vrouw Hermina, 1 Rob. Adm. 163; The Sechs Geschwistern, 4 id. 100; The Omnibus, 6 id. 71; The Minerva, 6 id. 396; The Ocean Bride, Eng. Adm. 1854, 33 Eng. L. & Eq. 576; The Soglasie, Eng. Adm. 1854, 33 Eng. L. & Eq. 587. The Ernest Merck, Eng. Adm. 1854, 33 Eng. L. & Eq. 594.

[2] The Louise Charlotte, 1 Dods. 308.

[3] Klingender *v.* Bond, 14 East, 484. But see Lemcke *v.* Vaughan, 1 Bing. 473, 8 J. B. Moore, 646, 7 Dowl. & R. 236. See generally Rawlinson *v.* Janson, 12 East, 223; The Jonge Johannes, 4 Rob. Adm. 263; The Jonge Klassina, 5 id. 297; The Cousine Marianne, Edw. Adm. 346; Robinson *v.* Morris, 5 Taunt. 720.

[4] Shepeler *v.* Durant, 14 C. B. 582, 25 Eng. L. & Eq. 334. The court in this case had made an order for time to plead, putting the defendant under terms to plead issuably. On the twenty-eighth of the month war was declared, and on the twenty-ninth the defendant took out a summons for leave to file the plea of alien enemy, which the court refused to grant. *Jervis*, C. J., said: "As far as I am concerned, I should not wish to encourage pleas of this sort. The court will not put the defendant into a position to plead such a plea. There may be countries in which advantage might be taken of such a plea; but fortunately in this country a more liberal policy prevails, and the courts here will require the utmost technical strictness in such cases, and will make every intendment against such a plea."

[5] Casseres *v.* Bell, 8 T. R. 166.

[6] Society for the Propagation of the Gospel *v.* Wheeler, 2 Gallis. 105, 127, 130.

[7] Thus in the case of the Society for the Propagation of the Gospel *v.* Wheeler, 2 Gallis. 105, 135, it being provided by treaty between England and this country, that

license to carry on a certain trade, he may insure it.[1] But it is otherwise with alien enemies generally, as we have seen. It may therefore be very important to ascertain who is, and who is not, an alien.

An alien is one who, in common phrase, belongs to another country; or in legal phrase, one who owes allegiance to the sovereignty of another country, and has there the rights and obligations of a citizen or subject. And, as a general rule, the citizens of a country which is under the temporary or permanent dominion of the enemies of another country, are considered as aliens in respect to such country, and all trade with them is illegal. But if the government chooses to recognise the country as neutral, courts of justice are bound by such recognition, and the citizens are treated as subjects of any other neutral power.[2]

Every man has a domicil somewhere or other;[3] and where he has not a domicil, it may be said that he is an alien. The right of a citizen of a country to expatriate himself during war, in order to acquire neutral rights and privileges, has been much discussed in this country, and perhaps on authority the law is not yet settled whether he may do this at all,[4] but it is

the subjects of either country who then held lands in the other, should continue to hold them, and that neither they nor their heirs and assigns should be regarded as aliens in respect to the lands and the legal remedies incident thereto, Mr. Justice *Story* expressed a strong opinion "that as to all the titles and estates within the article, an alien enemy might maintain all the legal remedies" in a time of war, as well as when the countries were at peace. In Wells v. Williams, 1 Salk. 46, 1 Ld. Raym. 282, it was held that an alien enemy living in a foreign country under a safe conduct, or an alien coming to a country in time of peace, and living there under protection, can maintain an action during war.

[1] Hagedorn *v.* Reid, 1 M. & S. 567; Kensington *v.* Inglis, 8 East, 273; Usparicha *v.* Noble, 13 East, 332. See also, De Tastet *v.* Taylor, 4 Taunt. 233; Grigg *v.* Scott, 4 Camp. 339.

[2] Blackburne *v.* Thompson, 15 East, 81, 3 Camp. 61; Hagedorn *v.* Bell, 1 M. & S. 450.

[3] Crawford *v.* Wilson, 4 Barb. 504.

[4] In The Dos Hermanos, 2 Wheat. 76, 98, there is a remark upon this point which, although not entitled to the force of a decision, as the opinion turned partly upon another point, is yet entitled to great weight. The question was as to the domicil of the claimant at the port of Carthagena, he having during the war returned to the United States, and become the owner of a privateer at New Orleans. Mr. Justice *Story* said: "In respect to the domicil of Mr. Green, there is certainly much reason to doubt, if it would be sufficient to protect him, even if he could show himself, at the

certain that if he removes "in order to mask his mercantile projects under a neutral flag," such an act is fraudulent and of no avail.[1]

Where the domicil is, depends upon the two essential elements, of *residence* and *intention*.[2]

Residence implies intention, where there is no evidence to the contrary;[3] and sometimes the whole question of domicil, or alienage, is determined by the consideration, whether the residence is of that length, or for that purpose, or of that character, that it implies absolutely, *intention*, and therefore proves domicil.

Every case in which this question arises must be judged of by itself. But some considerations and adjudications may be useful in determining it.

Domicil is but a Latin form of the word "home;" and every man has his home, says the Roman civil law, there where "he has established his hearth and the sum of his possessions

time of capture, a citizen of Carthagena. For if upon his return to New Orleans after the war, he acquired a domicil there (of which the circumstance of his becoming the owner of a privateer in that port affords a strong presumption), he became a redintegrated American citizen, and he could not, by an emigration afterwards, *flagrante bello*, acquire a neutral character, so as to separate himself from that of his native country." In The Santissima Trinidad, 7 Wheat. 283, 347, the same learned judge said: "Assuming for the purposes of argument, that an American citizen may, independently of any legislative act to this effect, throw off his own allegiance to his native country, as to which we give no opinion, it is perfectly clear that this cannot be done, without a *bonâ fide* change of domicil under circumstances of good faith. It can never be asserted as a cover for fraud, or as a justification for a commission of a crime against the country, or for a violation of its laws, when this appears to be the intention of the act. It is unnecessary to go into a further examination of this doctrine; and it will be sufficient to ascertain its precise nature and limits, when it shall become the leading point of a judgment of the court." In Jackson *v.* N. Y. Ins. Co., 2 Johns. Cas. 191, and in Duguet *v.* Rhinelander, 1 id. 360, it was held that a person cannot expatriate himself in time of war so as to assume the character of a neutral. The Court of Errors, however, reversed the decision in the latter case. 2 Johns. Cas. 476, 1 Caines, Cas. xxv. The continental jurists generally deny the right of a citizen to transfer his allegiance in time of war. See Vattel, liv. 1, c. 19, liv. 2, c. 27; Grotius de Jure Bel. ac Pac. liv. 2, c. 5, § 2; Puffendorf, Droit des Gens, liv. 8, c. 11, § 3.

[1] See Duguet *v.* Rhinelander, 2 Johns. Cas. 476, 1 Caines, Cas. xxv.; The Santissima Trinidad, 7 Wheat. 283, cited in the preceding note.

[2] Burnham *v.* Rangeley, 1 Woodb. & M. 7.

[3] In The Bernon, 1 Rob. Adm. 102, 104, Sir Wm. *Scott* said: "The presumption arising from a person's residence is, that he is there *animo manendi*, and it lies on him to explain it."

and his fortunes; whence he will not depart if nothing calls him away; whence if he has departed he seems to be a wanderer, and if he returns he ceases to wander."[1]

Where a man has his birth and parentage (or to speak more correctly his origin, for a man may be born in one country and yet, taking the domicil of his father, belong to another), there, unless circumstances show the contrary, is his domicil. And this domicil remains until it is changed.[2] Nor can it be changed by intention alone, without change in fact,[3] nor by change in fact alone without intent,[4] although, as we have seen, this change of residence may be such as to imply change of intention. And generally if a domicil is once acquired, it is presumed to continue till a new one is clearly shown.[5]

In the nature of things it is impossible to determine by a fixed rule what residence is sufficient to give a national character; nor have any governments or courts endeavored to do so. Various things must be taken into consideration. In few cases are all these present; and where they are so, one may be in one case

[1] Code, Lib. 10, tit. 39, 7.

[2] Brown *v.* Smith, 15 Beav. 444, 11 Eng. L. & Eq. 6; Sears *v.* City of Boston, 1 Met. 250; Crawford *v.* Wilson, 4 Barb. 504. In Bruce v. Bruce, cited 2 B. & P. 229, Lord Chancellor *Thurlow* said: "A person's origin in a question of, where is his domicil, is to be reckoned as but one circumstance in evidence, which may aid other circumstances; but it is an enormous proposition, that a person is to be held domiciled where he drew his first breath, without adding something more unequivocal." In Somerville *v.* Somerville, 5 Ves. 750, 787, it was held that the domicil of *origin* is to prevail "until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil, and taking another as his sole domicil." The learned Master of the Rolls then added: "I speak of the domicil of origin rather than of birth; for the mere accident of birth at any particular place, cannot in any degree affect the domicil. I have found no authority or dictum that gives, for the purpose of succession, any effect to the place of birth. If the son of an Englishman is born upon a journey in foreign parts, his domicil would follow that of his father. The domicil of origin is that arising from a man's birth and connections."

[3] Attorney-General *v.* Dunn, 6 M. & W. 511; Hallowell *v.* Saco, 5 Greenl. 143; State *v.* Hallett, 8 Ala. 159; Williams *v.* Whiting, 11 Mass. 424; Hairston *v.* Hairston, 27 Miss. 704.

[4] Bradley *v.* Lowry, 1 Speer's Eq. 1; Granby *v.* Amherst, 7 Mass. 1; Lincoln *v.* Hapgood, 11 id. 350; Harvard College *v.* Gore, 5 Pick. 370; Cadwalader *v.* Howell, 3 Harrison, 138; Wilton *v.* Falmouth, 15 Maine, 479.

[5] Cadwalader *v.* Howell, 3 Harrison, 138; Kilburn *v.* Bennett, 3 Met. 199; Burnham *v.* Rangely, 1 Woodb. & M. 7.

strong and important while the others are feeble and trifling, and another case may present the exact reverse.

The elements to be considered are (1), length of residence; (2) continuity of residence; (3) purpose or cause of residence; (4) character and extent of business done there, and its relation to the person's whole business, or to his business elsewhere; that is, is it principal and dominant, or only ancillary and subordinate; (5) his household and family ties or relations; (6) the kind and degree of communication which he keeps up with an earlier home. The general principle is well settled, that if a person goes abroad for the purpose of remaining there permanently, either with the intent of entering into business[1] or not, he is considered as an alien.[2] So completely is this rule established, that if a citizen of one country has his commercial domicil in another, he may engage in trade with a country which is at peace with his adopted country, although at war with his native country, and insurance on such trade may be affected in the latter country.[3]

But if a person goes to a foreign country, for a short time and a special purpose, with a decided intention of returning, he would not be thought by any one to acquire a domicil there.[4]

[1] One of the earliest, and the leading case on this subject is that of Mr. Whitehill, cited in The Diana, 5 Rob. Adm. 60. Here, a British merchant had gone to St. Eustatius only a day or two before it was taken possession of by a British force, but it being proved that he went for the purpose of remaining there permanently, his property was condemned. The general rule on this subject is well stated by Sir *Wm. Scott*, in The Indian Chief, 3 Rob. Adm. 12, 18, as follows: "No position is more established than this, that if a person goes into another country, and engages in trade, and resides there, he is by the law of nations to be considered as a merchant of that country." See also, O'Mealey *v.* Wilson, 1 Camp. 482; Willison *v.* Patteson, 7 Taunt. 439; Tabbs *v.* Bendelack, 4 Esp. 108; The Citto, 3 Rob. Adm. 38; The Aina, Eng. Adm. 1854, 28 Eng. L. & Eq. 600; The Abo, Eng. Adm. 1855, 29 Eng. L. & Eq. 591, 594; The Frances, 8 Cranch, 363; Murray *v.* The Charming Betsy, 2 id. 64, 120.

[2] Thorndike *v.* City of Boston, 1 Met. 242; Laneuville *v.* Anderson, 17 Jur. 511, 22 Eng. L. & Eq. 641, affirmed in the Privy Council, Anderson *v.* Laneuville, 9 Moore, P. C. 325, 29 Eng. L. & Eq. 59.

[3] Bell *v.* Reid, 1 M. & S. 726. And as a citizen of his adopted country, he may in time of peace engage in a trade which is prohibited to the citizens of his native country. Wilson *v.* Marryat, 8 T. R. 31, affirmed in the Exchequer Chamber, Marryat *v.* Wilson, 1 B. & P. 430.

[4] Sears *v.* City of Boston, 1 Met. 250. In this case a native inhabitant of Boston, intending to reside in France, departed for that country, and was followed by his family about three months afterwards. His dwelling-house and furniture were leased for a year, and he hired a house for a year in Paris. At the time of his departure, he

Nor if he is detained against his will and forcibly compelled to remain there, would any length of such enforced residence, give him there a legal domicil, or place upon him in his true home, — whether that was natural or acquired, — the disabilities of alienage,[1] unless while under such restraint he performs certain acts which tend to the support and maintenance of the enemies of the country to which he claims to belong. In which case, as to those acts he would certainly be considered as an enemy.[2]

But whatever was the original purpose, if the residence be long continued, then all the circumstances above enumerated must be considered in determining whether he has changed his residence.[3] And even if he goes there for a special purpose, yet if the time is indefinite and uncertain, his domicil is changed.[4]

intended to return and resume his residence in Boston, but had not fixed on any time for doing it. He returned in about sixteen months, and his family in about nine months afterwards. It was held that his domicil in Boston continued during his absence. See also, The Harmony, 2 Rob. Adm. 322, *infra*. In the Ship Ann Green, 1 Gallis. 274, a Scotchman, who was naturalized in 1804, and joined a commercial house in 1807, and was sent out to Jamaica in 1808 to collect debts due the house, where he remained about six or seven months and then returned to New York, and went out again in 1810, and remained there about a year, and went out a third time in 1811, and was still there at the time this suit was brought, in 1812, was held to be an American citizen.

[1] The Ocean, 5 Rob. Adm. 90.

[2] There is a dictum of Lord *Ellenborough*, to this effect in Bromley *v.* Hasseltine, 1 Camp. 75. The question in this case was whether an insurance by an alien resident in an enemy's country, on goods to be delivered for him at a neutral or friendly port, was valid. Lord *Ellenborough* said: "I don't know that merely because an alien happens to be resident in an enemy's country, goods to be delivered for him at a neutral or friendly port, are on that account uninsurable. Suppose a British merchant to be entrapped and confined in an enemy's country, it can scarcely be said that all the trade he may still carry on is, in aid of the king's enemies, illegal and incapable of being insured." See also, Bempde *v.* Johnstone, 3 Ves. 198, 202, per Lord Chancellor *Loughborough*.

[3] Thus in Elbers *v.* United Ins. Co., 16 Johns. 128, where a Swede came to the United States for the benefit of his health, and remained there two or three years transacting business, it was held that as to these transactions he was to be considered as having his domicil in the United States, and that it made no difference whether he had any permanent counting-house there or not.

[4] In The Harmony, 2 Rob. Adm. 322, Sir *Wm. Scott* considered the length of time a man resided in a place, as the great ingredient in determining whether his domicil was changed, when he went there for a special purpose. He said: "A special purpose may lead a man to a country, where it shall detain him the whole of his life. A man comes here to follow a lawsuit; it may happen, and indeed is often used as a ground

His assertions on the subject are often of great weight, provided they are not caused by interest, and especially if they are against his interest, or known wishes.[1] But the mere fact that one declares himself a foreign citizen, or the reverse, when it may well be that he does this to acquire rights which otherwise he could not possess, or escape from obligations which otherwise he could not avoid, would be of but little importance.[2]

of vulgar and unfounded reproach (unfounded as matter of just reproach, though the fact may be true), on the laws of this country, that it may last as long as himself. Some suits are famous in our juridical history for having even outlived generations of suitors. I cannot but think that against such a long residence, the plea of an original special purpose could not be averred." The case was also put of an American coming to Europe with six contemporary cargoes, he intending to return as soon as they were disposed of, and the same person coming with one cargo, and remaining to receive five other cargoes, one in each year successively, and the learned judge said: "I repeat, that time is the great agent in this matter; it is to be taken in a compound ratio, of the time and the occupation, with a great preponderance on the article of time: be the occupation what it may, it cannot happen, but with few exceptions, that mere length of time shall not constitute a domicil." In the case of The Ship Ann Green, 1 Gallis. 274, 285, Mr. Justice *Story* after citing the language of Sir Wm. *Scott*, above referred to, said: "Upon a residence therefore for mere temporary purposes, there may be engrafted all the effects of permanent settlement, if it be continued for a great length of time, and be attended with conduct which demonstrates that new views and new connections have supervened upon the original purposes: but on the other hand, mere length of time cannot of itself be decisive, where the purpose is clearly proved to have been temporary, and still continues so, without any enlargement of views; and even the shortest residence, if with a design of permanent settlement, stamps the party with a national character. The question, after all, results in an inquiry into the intention and conduct of the party; and it is extremely difficult to lay down any general rule upon the subject."

[1] Thorndike *v.* City of Boston, 1 Met. 242. The question in this case was, whether a party should be taxed in Boston, and it was held that a letter from him to an agent expressing his intention to reside abroad, was admissible, if written before he knew that a tax had been assessed upon him. See also Kilburn *v.* Bennett, 3 Met. 199; Burnham *v.* Rangeley, 1 Woodb. & M. 7.

[2] In The Venus, 8 Cranch, 253, *Washington*, J., said: "The question, whether the person to be affected by the right of domicil had sufficiently made known his intention of fixing himself permanently in the foreign country, must depend on all the circumstances of the case. If he had made no express declaration on the subject, and his secret intention is to be discovered, his acts must be attended to, as affording the most satisfactory evidence of his intention. On this ground it is that the courts of England have decided, that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes, by these acts, such evidence of an intention permanently to reside there, as to stamp him with the national character of the State where he resides. In questions on this subject, the chief point to be considered is the *animus manendi;* and courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appear that the inten-

If one who was a foreign citizen becomes a citizen of this country by naturalization, or by residence, his whole future conduct will be judged of in reference to a principle asserted by many courts, and illustrated by many cases, namely, that the native nationality easily reverts.[1] But a mere visit to his original country would not reintegrate him as a subject of that country if such visit was intended to be of short duration only.[2]

If a citizen of one country whether by birth or naturalization is doing business in a foreign country, and a war breaks out, the moment he puts himself in *itinere* to return to the country of his birth or adoption, the character which he had by residence, and which had become hostile by the war, is changed, and his native character is resumed.[3] But the mere intention of returning

tion of removing was to make a permanent settlement, or for an indefinite time, the right of domicil is acquired by a residence even of a few days. This is one of the rules of the British courts, and it appears to be perfectly reasonable. Another is, that a neutral or subject, found residing in a foreign country is presumed to be there *animo manendi;* and if a state of war should bring his national character into question, it lies upon him to explain the circumstances of his residence. The Bernon, 1 Rob. Adm. 102.

[1] La Virginie, 5 Rob. Adm. 98; The Indian Chief, 3 id. 12. See the remarks of Mr. Justice *Story* on this subject in the case of The Ship Ann Green, 1 Gallis. 274, 286, and in The Ship Francis, id. 614.

[2] The Friendschaft, 3 Wheat. 14. In this case a British merchant was in Lisbon at the time of the capture of his goods, carrying on business there. He afterwards went to London on business, leaving his affairs in Lisbon in charge of his clerks, and intending to return to that city himself. It was held that he had not become a reintegrated British subject. See also, The Vriendschap, 4 Rob. Adm. 166; Laneuville *v.* Anderson, 17 Jur. 511, 22 Eng. L. & Eq. 641, affirmed in the Privy Council, Anderson *v.* Laneuville, 9 Moore, P. C. 325, 29 Eng. L. & Eq. 59; The Ship Ann Green, 1 Gallis. 274, cited ante, p. 12, n. 4; Burnham *v.* Rangeley, 1 Woodb. & M. 7.

[3] The Indian Chief, 3 Rob. Adm. 12; The Ocean, 5 Rob. Adm. 90. In the case of The Ship St. Lawrence, 1 Gallis. 467, 471, Mr. Justice *Story* said: "The cases in which the party's putting himself in *itinere*, to return to his native country, has been held to exempt his property from the hostile character acquired by residence, are cases where such property has been engaged in a trade completely lawful in the native character. But the principle never has been and never could be extended to protect a trade, which was illegal in a native citizen; more especially a trade, which in the native character would be in the highest degree noxious. This distinction pervades the cases and reconciles all the apparent inconsistency." The cases referred to are The William, cited in The Hoop, 1 Rob. Adm. 196, 8 T. R. 548; The Indian Chief, 3 Rob. Adm. 12. In Amory *v.* M'Gregor, 15 Johns. 24, it was held that a citizen of the United States has the right on war breaking out between that country and England, to withdraw his property purchased before the war, within a reasonable time. In the case of the St. Lawrence, it was held that if this right existed, yet

without some overt act is not sufficient.[1] A man may have a neutral residence, and yet his property may acquire a hostile character.[2] In the same way he may be a merchant in more countries than one; and may thus acquire at least a quasi domicil beside that of his birth and parentage. And this would be respected by the law, provided there were no indication of fraudulent intention; none, that is, of an intention to mask his trade and nationality for a time; or to give himself two national characters, between which he could choose, from time to time, as suited the exigencies of the moment.[3]

We have here, as in other countries, trading partnerships, and even corporations. As a general rule, the former is not a legal person, and can have no domicil. And where a partner of a house of trade in one country is domiciled in another, he is con-

that it must be exercised within a reasonable time, and that the withdrawal eleven months after the declaration of war was too late. This decision was affirmed on appeal. 9 Cranch, 120. In The Venus, 8 Cranch, 253, the question was whether the property of persons who were born in England, but naturalized in the United States, and who were settled in England and engaged in the commerce of that country, should be condemned as prize, the property being shipped before they had knowledge of the war, and captured afterwards by an American cruiser. It was contended that American citizens settled in a foreign country, are entitled to a reasonable time to elect, after the existence of the war is known to them, to remain or to return to their own country, and that until such election is *bonâ fide* made, they are to be considered as American citizens, and their property shipped before they have an opportunity to make this election, as protected against American capture. But the court held that until the election was actually made, they were as to their business transactions to be considered as aliens. The dissenting opinion of *Marshall*, C. J., in this case, is one of great ability, and may well cause the doctrine laid down by the majority of the court to be questioned. The objections of the learned chief justice, however, apply more forcibly to the case of a native born citizen than to a naturalized one being in the country of his nativity, which latter was the case before the court.

[1] The Citto, 3 Rob. Adm. 38; The President, 5 Rob. Adm. 277; Tabbs *v.* Bendelack, 4 Esp. 108; The Venus, 8 Cranch, 253. In the case of The Frances, 8 Cranch, 335, a naturalized citizen returned in time of peace to his native country for the purpose of engaging in trade there, but with the design of ultimately returning to his adopted country. War broke out between the two countries, and he remained in his native country for more than a year in order to wind up his business. During this time he engaged in no new transactions, and often expressed his intention to return to his adopted country, which he actually did a little more than a year after war broke out. The court held that he had regained a domicil in his native country.

[2] The San Jose Indiano, 2 Gallis. 268.

[3] The Vriendschap, 4 Rob. Adm. 166; The Jonge Klassina, 5 id. 297; The Ann, 1 Dods. 221; Somerville *v.* Somerville, 5 Ves. 750.

sidered as belonging to the country of his domicil.[1] And it has been held that the property of a house of trade in an enemy's country is liable to condemnation, whatever be the domicil of the partners who constitute the house.[2] If some of the partners have a neutral residence, their separate property will not be affected by the fact of their being connected with a house of trade in a hostile country. And when a shipment is made by the house to a partner in a neutral country, or by a partner in a hostile country to a house in a neutral country, it depends upon whose account and risk the goods are shipped whether they are liable as prize.[3] Although a corporation is "an artificial person, a mere legal entity, invisible and intangible," yet it may have a domicil, and for this purpose it is considered as belonging to the country or State by which it is established.[4]

If a person transacts business, or resides in a colony, or a commercial factory under the protection and control of such establishments, and free from the authority of the government of the country, he is considered as partaking of the nationality of such colony or factory.[5] But this exception to the general rule

[1] The Harmony, 2 Rob. Adm. 322; The Antonia Johanna, 1 Wheat. 159.

[2] The Friendschaft, 4 Wheat. 105; The San Jose Indiano, 2 Gallis. 268.

[3] The San Jose Indiano, 2 Gallis. 268.

[4] Society for the Propagation of the Gospel *v.* Wheeler, 2 Gallis. 105, 131. Mr. Justice *Story* in this case said: "In general an aggregate corporation is not in law deemed to have any commorancy, although the corporators have; yet there are exceptions to this principle; and where a corporation is established in a foreign country, by a foreign government, it is undoubtedly an alien corporation, be its members who they may; and if the country becomes hostile, it may for some purposes at least be clothed with the same character." In 1 Phillips Ins. § 167, this rule is stated differently. It is said that "the national character of a corporation depends upon that of its members," citing Hope Ins. Co. *v.* Boardman, 5 Cranch, 57; Bank of U. S. *v.* Deveaux, 5 Cranch, 61; and Society, etc. *v.* Wheeler, 2 Gallis. 105. The last case we have already considered. The other cases decided that the right of a corporation to litigate in the courts of the United States depended upon the character (as to citizenship) of the members who composed the body corporate, and that a body corporate could not be a citizen, within the meaning of that word in the constitution giving the court jurisdiction over controversies between citizens of different States. Whether these cases warranted the deduction of Mr. Phillips, it is immaterial to consider, as they have been overruled, and it is now held that a corporation created by, and transacting business in a State, is to be deemed an inhabitant of the State, capable of being treated as a citizen, for all purposes of suing and being sued. Louisville Railroad Co. *v.* Letson, 2 How. 497; Marshall *v.* Baltimore & Ohio Railroad Co. 16 How. 314; Lafayette Ins. Co. *v.* French, 18 How. 404; Shelby *v.* Hoffman, 7 Ohio State, 450.

[5] Thus an American merchant at Calcutta is considered as under the British rule.

does not apply where the government of the country has the control, although peculiar privileges are granted to the subjects of a particular nation.[1] Although a foreign minister does not lose his domicil in his own country by residing in the foreign one to which he is accredited, yet if he engages in trade there, he is in respect to such trade considered as a citizen of the country in which it is carried on.[2]

Although for many purposes the domicil of a mariner or other person following the seas, is the country of his birth,[3] yet if he engages in a ship or a trade which is hostile to a particular country, he will, as to that country, be considered as an alien enemy.[4]

A prisoner of war, for many purposes, is not considered as an alien enemy, and if a subject of a neutral power, he may sue and be sued for contracts entered into while a prisoner.[5]

The Indian Chief, 3 Rob. Adm. 12. And an officer in the service of the East India Company, residing in the East Indies, does not thereby acquire a domicil in that country. Attorney-General *v.* Napier, 6 Exch. 217, 2 Eng. L. & Eq. 397. A merchant carrying on trade at Smyrna, under protection of the Dutch consul, has been considered as a Dutchman. The Twee Frienden, cited 3 Rob. Adm. 29. The same has been held of a Jew living in a Dutch establishment under the sovereignty of the rajah of Cochin, on the coast of Malabar. The Rachel, cited 3 Rob. Adm. 30. And a Swiss in a French factory in China, is considered as a Frenchmen. The Etrusco, cited 3 Rob. Adm. 31. See also, Whitehill's case, cited 5 Rob. Adm. 60; The Boedes Lust, id. 233; The President, id. 277.

[1] In The San Jose Indiano, 2 Gallis. 268, 292, a treaty between Portugal and Great Britain provided that British subjects should have the privilege of free trade within the Portuguese dominions, and should have the power of nominating, subject to the approbation and ratification of the crown of Portugal, judges conservators, who should try and decide all causes brought before them by British subjects. It was held, notwithstanding these liberties, that British-born subjects engaged in trade in Portugal, partook of the Portuguese character as to their trade. This case was decided on the authority of The Danous, 4 Rob. Adm. 255, note. See however, the remarks of Sir Wm. *Scott* in The Henrick & Maria, 4 Rob. Adm. 43, 61; The Flad Oyen, 1 id. 135, 142; The Nayade, 4 id. 251.

[2] The Indian Chief, 3 Rob. Adm. 12; The President, 5 id. 277; The Aina, Eng. Adm. 1854, 28 Eng. L. & Eq. 600; The Johanna Emilie, Eng. Adm. 1855, 29 Eng. L. & Eq. 562; Arnold *v.* United Ins. Co., 1 Johns. Cas. 363.

[3] Brown *v.* Smith, 15 Beav. 444, 11 Eng. L. & Eq. 6.

[4] The Soglasie, Eng. Adm. 1854, 33 Eng. L. & Eq. 587; The Embden, 1 Rob. Adm. 16; The Endraught, id. 19; The Vriendschap, 4 id. 166; The Frederick, 5 id. 8; The Ann, 1 Dods. 221. See Sparenburgh *v.* Bannatyne, 1 B. & P. 163, cited in next note.

[5] In Sparenburgh *v.* Bannatyne, 1 B. & P. 163, the plaintiff was the subject of a neutral State, but was taken prisoner while serving in a hostile fleet. He was sent to

In general, the courts of no country regard the revenue laws of another country, so far as to consider a contract void for illegality because it violates, or proposes a violation of them.[1]

B. *Of the Form of the Contract.*

The instrument by which the contract of insurance is expressed, is nearly always in practice, the policy of insurance in use where the insurance is effected; but it may be in another form; and we think it may be oral only, and yet binding, for many purposes, and under many circumstances.[2]

England by order of the governor of the place to which he was first taken, in a British merchant vessel, which was then short of hands. On the voyage he did his duty as one of the crew, and on arrival in port was delivered over to the commissary as a prisoner of war. To an action for wages for the services performed, the defendant filed the plea of alien enemy, but the court held that he was only to be considered an alien enemy as to the act of hostility, because when he ceased to be hostile, owing no permanent allegiance to the enemy, his character as an enemy was determined, and that he was entitled to recover.

[1] Thus, if an insurer knows that trade to a certain place is prohibited, and insures a cargo to that place, he is liable if it is seized. Pollock *v.* Babcock, 6 Mass. 234. See also, Lever *v.* Fletcher, Park, Ins. 313; McFee *v.* South Carolina Ins. Co., 2 McCord, 503. In Andrews *v.* Essex F. & M. Ins. Co., 3 Mason, 6, 18, Mr. Justice *Story* states the law as follows: "If the trade is known to be illicit, and can be carried on only by smuggling, and the underwriters do not make an exception of the risk of illicit trade, there is the strongest presumption of their intention to take it." See also, Gardiner *v.* Smith, 1 Johns. Cas. 141.

[2] There seems to be no reason why the general principle both of the common and of the civil law, that the evidence of a contract need not be in writing unless expressly required so to be, should not make a parol contract of insurance valid. It seems to have been so assumed in Smith *v.* Odlin, 4 Yeates, 468, by the majority of the court. In Hamilton *v.* Lycoming Mut. Ins. Co., 5 Barr, 339, a parol agreement to insure was enforced. See also, McCulloch *v.* Eagle Ins. Co., 1 Pick. 278, 280, per *Parker*, C. J.; Tayloe *v.* Merchants' Ins. Co., 9 How. 390. The language of the court in the case of Real Estate Mut. Fire Ins. Co. *v.* Roessle, 1 Gray, 336, seems to imply that the contract is not complete till the policy is delivered. The action was brought by the company to recover the amount of the premiums, deposit notes, and assessments upon two policies of insurance. The policies were made out, but the defendant refused to receive them. The case was submitted without argument, and no authorities are cited by the court. The judgment was for the defendant. Mr. Justice *Dewey*, in delivering the opinion of the court, puts this question: "Suppose a loss by fire had occurred, and the buildings, the subject of the proposed insurance, had been destroyed, would any liability have thereby attached to the plaintiffs, by reason of these policies? Clearly not; because they had not been delivered to the defendant." This question may now be deemed to be set at rest by a recent decision of the circuit court of the United States, affirmed by the supreme court. Union Mut. Ins. Co. *v.* Commercial

If, however, by the act of incorporation of the company the contract is required to be in writing, a parol agreement to insure is not binding.[1] It is provided by law in Massachusetts that all policies of insurance shall be subscribed by the president, or in case of his death, inability, or absence, by any two of the directors, and countersigned by the secretary of the company.[2] This has been held to apply merely to the way in which the evidence of the contract should be furnished, and not to the contract itself.[3] But in New York it has been held, in a case where similar formalities were required by the charter of the company, that a parol contract is not binding.[4] In Pennsylvania, it has

Mut. Mar. Ins. Co., 2 Curtis, C. C. 524. A bill in equity was brought by the complainants to compel the specific performance of a contract for reinsurance on the ship Great Republic. Some of the facts in the case were in controversy, but the following are those found by the court, and on which the decision was rendered. The agent of the plaintiffs went to the office of the defendants on the 24th of December, and the president not being in, he filled up a blank proposal in the usual form. He called again that day and saw the president who offered to make the insurance at a certain rate. The agent said he would consult with his principal, to which the president assented; and on Monday, the 26th, receiving an answer accepting, he saw the president and told him that the offer was accepted. The rate as agreed upon was inserted in the proposal. That night the vessel was destroyed by fire. The proposal was in the usual form, with "Binding," and a blank left for the president's name. This blank had not been filled up. Mr. Justice *Curtis* held that the contract was complete as soon as the proposal was accepted; and the decision was affirmed on appeal. Commercial Mut. Mar. Ins. Co. *v.* Union Mut. Ins. Co., 19 How. 318.

[1] Cockerill *v.* Cincinnati Mut. Ins. Co., 16 Ohio, 148; Courtnay *v.* Miss. M. & F. Ins. Co., 12 La. 233. These cases proceed on the ground that a corporation is a mere creature of the law and can act only in the manner prescribed by the act of incorporation which created it. See Head *v.* Providence Ins. Co., 2 Cranch, 127. In Berthoud *v.* Atlantic Mar. & F. Ins. Co., 13 La. 539, a written application for insurance was made, and the rate of premium marked on the application by the secretary of the company. The policy was made out and signed, but the plaintiff was informed that it would not be delivered until the premium was paid. Five days afterwards the vessel was burned. The premium not having been previously paid, it was held that the insurers were not liable. See also Flint *v.* Ohio Ins. Co., 8 Ohio, 501; Sandford *v.* Trust Fire Ins. Co., *infra*. In England the contract is required to be in writing. Stat. 35 Geo. 3, c. 63. See also, Morgan *v.* Mather, 2 Ves. 15, 18. On the continent generally the maritime codes provide to the same effect. Code de Com. liv. 2, tit. 10, art. 332, 333, 337; Genoa, 2 Mag. 65; Rotterdam, 2 Mag. 94; Amsterdam, a. 23, 2 Mag. 128; Prussia, a. 3, 2 Mag. 189; Hamburg, 2 Mag. 212; Stockholm, 2 Mag. 407. See also, Emerigon on Insurance, ch. 11, § 1.

[2] Rev. Stats. Mass. c. 37, § 13.

[3] Union Mutual Ins. Co. *v.* Commercial Mut. M. Ins. Co., 2 Curtis, C. C. 524, affirmed 19 How. 318.

[4] Spitzer *v.* St. Marks Ins. Co., 6 Duer, 6. On page 14, the case of First Baptist

been said that although the policy expressly requires that it shall be countersigned by an agent of the company, yet that this may be dispensed with if the intention to execute it is sufficiently plain.[1]

An agreement to insure, entered and subscribed in the usual way on the books of the insurers, is undoubtedly a valid contract of insurance in this country.[2] And it means insurance after the form of the policy commonly used by the insurers.[3] If an agent of a company is authorized to make an agreement to insure, but not to make out the policy, his principals are liable, on his agreeing to take the risk.[4] So if the insured has asked proposals or terms of the insurers by letter, and an answer is

Church *v.* Brooklyn F. Ins. Co., 18 Barb. 69, to the contrary, is said to have been reversed by the Court of Appeals. In Sandford *v.* Trust Fire Ins. Co., 1 N. Y. Legal Observer, 214, before *Hoffman*, V. C., the charter of the company contained the following clause: "The policies must be subscribed by the president, and countersigned by the secretary, and shall be binding and obligatory as if under seal; and there shall be distinctly and legibly printed, or written upon the face of every policy of insurance, *or other contract or obligation*, made by the said corporation, the amount of its capital actually paid in." It was held that this clause showed that the contract must be in writing, because otherwise the amount of capital could not be printed on the contract. When this case came before the higher court no opinion was expressed on this point, as the Chancellor was of the opinion that no contract had been perfected by the parties. Sandford *v.* Trust Fire Ins. Co., 11 Paige, Ch. 547.

[1] Myers *v.* Keystone Mut. Life Ins. Co., 27 Penn. State, 268.

[2] Loring *v.* Proctor, 26 Maine, 18; Blanchard *v.* Waite, 28 id. 51. In Woodruff *v.* Columbus Ins. Co., 5 La. Ann. 697, the insurance company wrote on the application, "Taken at three per cent. premium." This was considered an acceptance, and the company were held liable. See also, Perkins *v.* Washington Ins. Co., 4 Cowen, 645, 6 Johns. Ch. 485. In England such a slip, not being stamped, cannot be received in evidence. Rogers *v.* M'Carthy, Park Ins. 37; Marsden *v.* Reid, 3 East, 572.

[3] In Oliver *v.* Commercial Mut. Mar. Ins. Co., 2 Curtis, C. C. 277, 291, Mr. Justice *Curtis* said: "Parties who contract for policies of insurance are not expected to insert in the contract every particular, needful to be inserted in the policy. The underwriters, on their part, agree to effect insurance; the numerous limitations of their liability as insurers, which appear in the different memorandums and other special printed clauses in the policy are not mentioned. Their obligation is understood to be, to make out a policy in the usual form, and containing the usual clauses, adapted to the case, made by the agreement of the parties." See also, Franklin Fire Ins. Co. *v.* Hewitt, 3 B. Mon. 231, 239.

[4] Palm *v.* Medina Co. Fire Ins. Co., 20 Ohio, 529. The printed form of the application stated that the policy would be issued if the application should be approved of by the company, but it was held that as the refusal to make out the policy did not proceed on the ground that the risk was objectionable, the company was liable notwithstanding the clause.

made by letter, and the insured replies accepting the terms, this is a valid and completed contract as soon as the letter of acceptance is mailed, although it is to be carried out afterwards in point of form, by the giving and receiving of the policy and premium.[1] But if the postmaster is acting as the agent of the party seeking to obtain insurance, the delivery to him of the acceptance of the offer does not complete the contract if the property, on which insurance was sought to be made, is destroyed before the acceptance is actually mailed.[2] Either party may rescind, by a notice of rescission sent to and received by the other party before the contract is complete.[3] Thus the insured may alter his mind, and if he can get his refusal of the terms offered by the insurers into their hands before his acceptance reaches them, there is no contract. And the insurers may rescind if they send their letter or notice thereof and it reaches the insured before he has mailed his letter of acceptance. But if their letter, although written and mailed before his acceptance, or before their letter offering terms had reached him, does not itself reach the insured until after the mailing of the letter of acceptance, the contract is complete.[4] But the acceptance, on

[1] Tayloe *v.* Merchants F. Ins. Co., 9 How. 390; Dunlop *v.* Higgins, 1 H. L. Cas. 381; Duncan *v.* Topham, 8 C. B. 225; Mactier *v.* Frith, 6 Wend. 103; Neville *v.* Merchants & Manuf. Mut. Ins. Co. of Cin., 17 Ohio, 192. The case of McCulloch *v.* Eagle Ins. Co., 1 Pick. 278, 281, has not been sustained by subsequent authorities. See note 4, *infra*, and the cases there cited.

[2] Thayer *v.* Middlesex Mut. Ins. Co., 10 Pick. 326.

[3] Routledge *v.* Grant, 3 Car. & P. 267, 4 Bing. 653; Payne *v.* Cave, 3 T. R. 148; Boston & Maine Railroad *v.* Bartlett, 3 Cush. 224; Eliason *v.* Henshaw, 4 Wheat. 225.

[4] It seems to be settled law, as shown by the authorities already cited, that one who makes a proposition by letter is presumed by the law to be making that offer continually, until the party receiving it, has a reasonable opportunity to accept it; if he accepts it, the contract is complete; if he declines, expressly or by silence or neglect, the offer is at end, and no subsequent acceptance makes a contract. It is also settled that the offerer may revoke and withdraw his offer before an acceptance of it. (See cases cited in the two preceding notes.) But the question occurs, whether that is a sufficient revocation, which is made by the offerer, by his mailing the revocation before acceptance, although the acceptance is made before the revocation reaches the acceptor. This precise question has not been determined. It may be stated as the question whether the presumption that the offer continues is so far a presumption of law that it cannot be rebutted by showing a revocation unknown to the acceptor, or whether it is merely a presumption of fact open to rebutting evidence. We suppose that the recent decisions lead strongly to the rule, that such revocation is not complete unless it reaches the

whichever side it is made, must conform exactly — so far as its substance is concerned — with the proposal, or there is no assent

acceptor before his acceptance. This might seem to be a contravention of the rule, that the contract is complete only when the minds of both parties agree on the same thing. But that rule has necessary qualifications. If a party made an offer by mail, no one would suppose that offer revoked by a mere change of will on the part of the offerer, however certainly made known to others, in conversation or otherwise, if not made known to him to whom the offer was made. If the rule were carried so far as this, it would be difficult to know when any contract was made. The rule must mean, therefore, that the law presumes that A's mind remains what it was, as long as B, by A's act, has the right to presume that it so remains. And, therefore, we should say that a revocation did not operate when mailed, just as it would not operate when communicated to friends; but that it did operate when known to the acceptor, unless he had then completed the bargain by his assent; and that he did this by mailing his assent. It seems to us that this rule of law is required by a practical necessity. We have said that this is an open question, and it will be found to be so upon a careful examination of the authorities. In order to present the exact existing state of the law, we shall be obliged to make a more extended review of the decisions than we should, were the question not one of so much importance and yet undetermined.

The case of M'Culloch *v.* Eagle Ins. Co., 1 Pick. 281, has been much commented on in the cases, and by text-writers. The facts of the case are very simple. A wrote to B inquiring on what terms he would insure his vessel. On the first of January B wrote that he would insure it at a certain rate. On the second, B wrote another letter retracting. A, before he received the last letter, but after it was mailed, wrote and put into the post-office an answer to B's first letter, accepting the terms proposed. The court held, that the proposal was revoked and the contract was not complete. This case is generally cited as being utterly inconsistent with Adams *v.* Lindsell, 1 B. & Ald. 681; but the facts of the two cases are not the same. In Adams *v.* Lindsell an offer to sell certain goods was made on the second of the month. The letter accepting was mailed on the fifth and received on the ninth. On the eighth the offer was revoked by the sale of the goods to another party. It will be seen, therefore, that in this case the retraction of the offer was subsequent in point of time to the mailing of the letter of acceptance, while in M'Culloch *v.* Eagle Ins. Co. it was prior. In Adams *v.* Lindsell the court said: "The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is complete by the acceptance of it by the latter." This has been supposed to imply that after a person has accepted an offer by mailing a letter to that effect, he is obliged to remain of the same mind unless notice of his change of intention can be brought to the knowledge of the party making the offer before the first letter of acceptance is received. That the court did not necessarily mean this is evident from an examination of the facts of the case. It had been argued on the authority of Cooke *v.* Oxley, 3 T. R. 653, that the contract was not complete till notice of the acceptance arrived, because as the meeting of the minds of the parties constitutes the essence of the contract, the person offering should be proved to be of the same mind. But the court said that the law presumed that a person making an offer, or accepting one, continued of the same mind until his letter (or other information of the change in his mind) reached the other party. If the remark meant more than this, it has not been followed either in England or in this country. See cases cited ante, p. 22, n. 3. Having seen, then, that the two cases are quite distinct, let us examine how far they are incon-

and no contract. For it is a universal principle, that there is no valid contract unless the minds of the parties meet; that is, agree together about the same thing, in the same sense.[1]

sistent with each other. The case of M'Culloch *v.* Eagle Ins. Co. may be considered as deciding, 1st, that a letter accepting does not bind the party accepting, till it is received by the party making the offer, and that until that time the party offering has a right to retract his offer; and, 2d, that if the letter accepting takes effect not from its reception, but from the time it was mailed, the letter of retraction must take effect from the same point of time, namely, when it was mailed and not when it was received. Though the first proposition was the one chiefly relied on by the court, yet the second was also considered. The counsel for the plaintiff contended that the putting the letter of the third into the post-office was a delivery to the defendant. "If so," said Mr. Justice *Wilde*, interrupting him, "why was not the putting of the defendant's letter of the second into the post-office a delivery to the plaintiff." The first proposition must now be considered as contrary to the general current of authorities, and it is settled that offers are to be considered as made and accepted at the time the letters containing them are respectively mailed. Mactier *v.* Frith, 6 Wend. 103; Adams *v.* Lindsell, *supra;* Potter *v.* Sanders, 6 Hare, 1; Dunlop *v.* Higgins, 1 H. L. Cas. 381; Duncan *v.* Topham, 8 C. B. 225; Kufh *v.* Weston, 3 Esp. 54; Stocken *v.* Collin, 7 M. & W. 515; Tayloe *v.* Merchants' Ins. Co., 9 How. 390; Averill *v.* Hedge, 12 Conn. 424; Vassar *v.* Camp, 14 Barb. 341; Brisban *v.* Boyd, 4 Paige Ch. 17; Levy *v.* Cohen, 4 Ga. 1, 13; Chiles *v.* Nelson, 7 Dana, 281. And in Thayer *v.* Middlesex Mut. F. Ins. Co., 10 Pick. 326, *Shaw*, C. J., said: "It may well be conceded, that where notice is to be given by mail, a notice actually put into the mail, especially if forwarded and beyond the control or revocation of the party sending it, may be good notice."

It has also been decided that after the letter has been mailed the sender is not responsible for any fault or negligence on the part of the post-office. Dunlop *v.* Higgins, *supra;* Duncan *v.* Topham, *supra;* Stocken *v.* Collin, 7 M. & W. 515.

In Tayloe *v.* Merchants' Fire Ins. Co., 9 How. 390, 400, it is said by Mr. Justice *Nelson*, that an offer cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted. If this doctrine is correct, then M'Culloch *v.* Eagle Ins. Co. was wrongly decided. But it must be admitted that this expression of opinion is, to some extent, a *dictum*. This appears by a reference to the facts of the case. The letter proposing the terms of insurance was sent on the second of December, the reply accepting was dated and sent on the twenty-first, and the house was burned on the twenty-second. There was no pretence that the offer was not in full force on the twenty-first. The ground of defence

[1] Routledge *v.* Grant, 3 Car. & P. 267, 4 Bing. 653; Ocean Ins. Co. *v.* Carrington, 3 Conn. 357; Eliason *v.* Henshaw, 4 Wheat. 225; Hutchison *v.* Bowker, 5 M. & W. 535. In the late case of Myers *v.* Keystone Mut. Life Ins. Co., 27 Penn. State, 268, the party was already insured, but wished to effect another insurance with the same company on the same subject-matter on different terms. He agreed with the agents of the company on the terms, subject to the ratification by the company. A policy differing from what was agreed on was sent him with the request that he would return the first, and pay the balance due, if he wished to accept the second policy, or else to return the second. He retained the second, but did not return the first or pay the balance. Held, that this was not evidence of his acceptance of the terms proposed.

Where a policy is made absolutely void by a breach of any of its conditions, it is not revived by a mere waiver.[1] But generally,

was, that as the letter was not received till the thirty-first, the contract was not complete till then. The head note in the case of Hamilton *v.* Lycoming M. Ins. Co., 5 Barr, 339, is to the same effect as the remarks in Tayloe *v.* Merchants' Ins. Co. above cited, and "per *Gibson*, C. J.," is attached to it. And, although *Gibson*, J., does not use the very words of the head note, we think it fairly expresses his opinion, as that may be gathered from the decision; but this opinion must be regarded as *obiter*, the precise question not arising in the case.

It has been recently settled in Massachusetts that where the party making the offer gives a certain time to the other party in which to accept, he has a right to retract his offer within the time, provided he does so before the other accepts. Boston & Maine Railroad *v.* Bartlett, 3 Cush. 224. And in Eliason *v.* Henshaw, 4 Wheat. 225, the court said: "It is an undeniable principle of the law of contracts that an offer of a bargain by one person to another imposes no obligation upon the former, until it is accepted by the latter according to the terms in which the offer was made." Now, if no obligation is imposed it would seem to follow that the party making the offer has the right to retract it at any time before the letter of acceptance is mailed. And this is not disputed, but it is contended that the retraction must reach the other party before the letter of acceptance is mailed. This proposition may be, however, open to the objection that it makes the letter of retraction date from the time when it is received, while the others date from the time when they are sent; and that if this be the law a party has a right to retract, but not the power to make that retraction immediately effectual. But we think it a sufficient answer to this objection, that while the party has a perfect right to change his mind when he will, he has no right to change the rights of the other party, except by an expression of his change of mind. If the offer be made by conversation, whatever be the change of mind, if it be silent it is ineffectual, nor has it any legal force until that change of mind is expressed and there be an uttered withdrawal. And if the bargain be made by letter, the reception of the letter by the person to whom it is sent, is the best and indeed only equivalent of the expressed retraction by words spoken and heard. There is certainly much want of unanimity not

[1] Smith *v.* Saratoga County Mut. Fire Ins. Co., 3 Hill, 508, 511, per *Bronson*, J. See also, Neely *v.* Onondaga Co. Mut. Ins. Co., 7 Hill, 49. A forfeiture, however, arising from a deviation may be waived by writing. See post, ch. 8, § 6. In Frost *v.* Saratoga Mut. Ins. Co., 5 Denio, 154, the assured, in his application for insurance against a fire risk, which was made a part of the policy, had untruly stated that there were no buildings withing ten rods of the buildings insured. The insurers, with a knowledge of the loss and of the inaccuracy of the statement, afterwards made assessments on the premium note given by the assured, which he had paid. Held, that the insurers were estopped by these facts from setting up the warranty, and were liable for the loss. But see Smith *v.* Saratoga Co. Mut. Ins. Co., 3 Hill, 508; Neely *v.* Onondaga County Mut. Ins. Co., 7 Hill, 49; Murdock *v.* Chenango Co. Mut. Ins. Co., 2 Comst. 210 Whether a mere parol waiver would be sufficient depends, we think, upon the further question whether the policy provides that it shall be in writing, for generally a parol waiver would be sufficient. See Goit *v.* National Protection Ins. Co., 25 Barb. 189; Hale *v.* Mechanics' Mut. F. Ins. Co., 6 Gray, 169. In Cockerill *v.* Cincinnati Mut. Ins. Co., 16 Ohio, 149, it was held that a verbal waiver without further consideration was not binding.

if certain things were to be done before the contract would be complete, the issuing of the policy would be a waiver of their performance.[1]

only as to the rule of law, but as to the meaning and effect of the cases. In Falls *v.* Gaither, 9 Porter, 605, the following case is put by the court: "Suppose A offers to sell B a slave, B accepts the offer by addressing a letter to A, assenting to his terms; if the latter did not, previous to the date of B's letter, recall the offer, he is bound by the contract, but if he withdrew it by a letter sent to B before B's letter was written, the acceptance of the letter would be unavailing for any legal purpose, and this too though the letter of withdrawal was not received." The court reviewed the two cases of M'Culloch *v.* Eagle Ins. Co., and Adams *v.* Lindsell, and gave the preference to the latter, and it may, therefore, be inferred that they could not have understood the language used by the English court in the broad extent claimed by the text-writers. Mr. Justice *Marcy*, in Mactier *v.* Frith, said: "The principle of the decision of the King's Bench is simply, that the acceptance of an offer, made through the medium of a letter, binds the bargain, if the party making the offer has not revoked it, as he has a right to do before it is accepted. The rule laid down by the Supreme Court of Massachusetts regards the contract as incomplete until the party making the offer is notified of the acceptance, or until the time when he should have received it, the party accepting having done what was incumbent on him to give notice." By the civil law there is no contract if the letter of retraction is written and sent before the letter of acceptance is sent. Pothier, Contrat de Vente, p. 1, § 2, art. 3, n. 32, Cushing's Translation, p. 18, says: "In order that the consent of the parties may take place in the last-mentioned case, it is necessary that the will of the party, who makes a proposition in writing, should continue until his letter reaches the other party, and until the other party declares his acceptance of the proposition. This will is presumed to continue, if nothing appears to the contrary, but if I write a letter to a merchant living at a distance, and therein propose to him to sell me a certain quantity of merchandise, for a certain price; and before my letter has time to reach him, I write a second, informing him that I no longer wish to make the bargain; or if I die; or lose the use of my reason; although the merchant, on the receipt of my letter, being in ignorance of my change of will, or of my death, or insanity, makes answer that he accepts the proposed bargain; yet there will be no contract of sale between us; for as my will does not continue until his receipt of my letter, and his acceptance of the proposition contained in it, there is not that consent or concurrence of our wills, which is necessary to constitute the contract of sale. This is the opinion of Bartholus, and the other jurists cited by Bruneman, ad. I. 1, § 2, D. de contrah. empt. (18, I. 1, § 2), who very properly rejects the contrary opinion of the Gloss, *ad dictam legem.*" He then goes on to say, that if the merchant suffer any wrong through the refusal, he has his right of action, though there be no contract. Toullier, also, vol. 6, No. 30, puts this case: "Offer made January 1st, acceptance January 5th. The letter of the 5th arrives on the 8th, but on the 7th, the acceptance being unknown, I revoke. Held, no contract." Mr. Justice *Ware*, in the case of The Palo Alto, Daveis, 357, held, that an offer until received, is but a proposition *in mente retentum*, and that the revocation must date,

[1] Hall *v.* Peoples' Mut. F. Ins. Co., 6 Gray, 185. It was held, in this case, that the issuing of a policy upon an application for insurance, one interrogatory in which was unanswered, was a waiver of that defect.

SECTION II.

OF THE FORM AND ESSENTIALS OF A POLICY OF INSURANCE.

The policy varies in different States, and from time to time in all our States; but the general form and phraseology of the old English policy is usually, or indeed always, retained; and it might subject all parties to much inconvenience, if forms and phrases were abandoned of which the precise meaning has been at length settled, by long and expensive litigation.[1]

The policy is subscribed only by the insurers; but it is a binding contract, or evidence of one, on both sides; and as soon

therefore, from the same time, that is, when it was received. Mr. Justice *Duer*, in an elaborate note in his Treatise on Insurance, vol. 1, p. 116, supports with great ability the doctrine that the party accepting must have notice of the retraction before the letter of acceptance is mailed. And this learned jurist founds this opinion upon his construction of Adams *v.* Lindsell. And he considers the case of Head *v.* Diggon, 3 Man. & R. 97 (if it was decided on the facts of the case), to be inconsistent with his views of the law. In this case A offered goods to B at a certain price, and gave him three days in which to make up his mind. Before the time expired A offered the goods to C. Held, that B could not declare against A as upon an absolute bargain. Although the case may have gone off on a question of pleading, still it is so similar to Boston & Maine Railroad *v.* Bartlett, *supra*, that Mr. *Duer* may, therefore, perhaps, be supposed as differing from that case. At all events we consider Boston & Maine Railroad *v.* Bartlett, as unquestionable law.

[1] For observations upon the loose and inaccurate manner in which policies are drawn, see Simond *v.* Boydell, 1 Doug. 270, per Lord *Mansfield*, C. J.; Marsden *v.* Reid, 3 East, 572, 578, per *Lawrence*, J.; Le Cheminant *v.* Pearson, 4 Taunt. 367, 380, per *Mansfield*, C. J.; Brough *v.* Whitmore, 4 T. R. 206, 210, per *Buller*, J. "I remember," said Lord *Kenyon*, C. J., in Brough *v.* Whitmore, "it was said, many years ago, that if Lombard street had not given a construction to policies of insurance, a declaration on a policy would have been bad on a general demurrer; but that the uniform practice of merchants and underwriters had rendered them intelligible." See also, Yeaton *v.* Fry, 5 Cranch, 335, 342; Maryland Ins. Co. *v.* Woods, 6 Cranch, 29, 45, per *Marshall*, C. J. Lord *Eldon*, in Smith *v.* Robertson, 2 Dow, 474, speaking of the contract of insurance, remarked: "It might, perhaps, be found when the matter came to be examined with the proper degree of impartiality that there was full as much uncertainty on this subject as in any other branch of the law." And notwithstanding the time that has elapsed since this opinion was pronounced, there seems to be quite as much uncertainty at the present day. For, although many old questions have been settled, yet new ones are constantly arising, and the courts are sometimes inclined to question the decisions of the old. In New York, distinct forms of policies are used for the different subjects of insurance, as ship, freight, and profits. 1 Duer, Ins. 63.

as there is an inception of the risk the insured is bound by the policy, as respects the premium and otherwise as much as if he signed it himself.[1] But until there is an inception of the risks insured against, the insured has his option whether they shall begin under the policy or not.[2] Therefore, until these risks are incurred, so as to make him liable for the premium, there is no obligation resting on him that can be enforced by the insurers. All the stipulations on his part are merely conditions, a compliance with which is necessary to enable him to recover against the insurers; but no action can be maintained by them against him.

The policy which usually states the reception of the premium binds the insurers, although the premium has not been paid, nor a note for it given; and this, even if the policy was not delivered from the office, if it was only delayed, and there was evidence otherwise of a completion of the contract.[3] And if the policy provides that there shall be no insurance until the actual payment of the premium, as this provision is inserted for the benefit of the insurer, it may be waived by him or his agent.[4] And if a policy be delivered after the day of its date, it may take effect from its date, as if it had then been delivered, if this be the manifest intention of the parties.[5]

[1] Ins. Co. of Penn. *v.* Smith, 3 Whart. 520, 529, per *Rogers*, J.; Patapsco Ins. Co. *v.* Smith, 6 Harris & J. 166.

[2] Tyrie *v.* Fletcher, Cowp. 666, per Lord *Mansfield;* Taylor *v.* Lowell, 3 Mass. 331, 343; Emerigon, ch. 3, s. 1, § 4, Meredith's ed., 52. See also, post, ch. 5.

[3] Power *v.* Butcher, 10 B. & C. 329. In Kohne *v.* Ins. Co. of North America, 1 Wash. C. C. 93, which was an action of trover for a policy of insurance, the plaintiff's agents had settled the terms of insurance with the president of the insurance company, but had left the office before the policy was filled up. It was filled up a few hours afterwards, and the president gave notice of this to the agent, mentioning at the same time that information had been received that the ship had been captured and carried into Halifax. Both parties were ignorant of the loss when the policy was executed. The agent afterwards called to deliver the premium note and receive the policy, but the company refused to deliver it. Mr. Justice *Washington* charged the jury that the agreement of insurance was not inchoate but perfected. The plaintiff recovered. See Warren *v.* Ocean Ins. Co., 16 Maine, 439; Loring *v.* Proctor, 26 id. 18; Blanchard *v.* Waite, 28 id. 51; Bragdon *v.* Appleton Mut. F. Ins. Co., 42 Maine, 259; and cases ante, p. 19, n. 2; p. 20, n. 1.

[4] Goit *v.* National Protection Ins. Co., 25 Barb. 189.

[5] Lightbody *v.* North American Ins. Co., 23 Wend. 18. This was an insurance against fire. On the day of the date of the policy, a valid agreement for insurance had been entered into with the company's agent and the premium paid. The policy was delivered after the loss.

The general rule is, that if a policy insures the interest of one person only, no other person can show that it was also intended to cover his interest;[1] but it is not regarded as insuring the interest of one person only, if the policy contains the general phrase for "all whom it may concern,"[2] or some other expression indicating that the assured acts as agent or trustee for another, in which case such other person may prove his interest.[3] This

[1] Turner *v.* Burrows, 5 Wend. 541; Holmes *v.* United Ins. Co., 2 Johns. Cas. 329; Newson *v.* Douglass, 7 Harris & J. 417; Wise *v.* St. Louis Mar. Ins. Co., 23 Mo. 80. An insurance by one partner in his own name, without general words, covers his interest only. Graves *v.* Boston Marine Ins. Co., 2 Cranch, 419; Pearson *v.* Lord, 6 Mass. 81; Turner *v.* Burrows, 5 Wend. 541. See also, Bell *v.* Ansley, 16 East, 141; Hibbert *v.* Martin, 1 Camp. 538; Cohen *v.* Hannam, 5 Taunt. 101; Lawrence *v.* Sebor, 2 Caines, 203. So, also, in the case of part-owners, Robinson *v.* Gleadow, 2 Bing. N. C. 156; Bell *v.* Humphries, 2 Stark. 345; Foster *v.* U. S. Ins. Co., 11 Pick. 85; Dumas *v.* Jones, 4 Mass. 647; Finney *v.* Bedford Com. Ins. Co., 8 Met. 348; Murray *v.* Columbian Ins. Co., 11 Johns. 302; Garrell *v.* Hanna, 5 Harris & J. 412.

[2] Blank insurances were formerly in use in England. This practice was abolished by 25 Geo. 3, c. 44, which statute directed that the name of the party interested in the insurance, or that of his agent, should appear in the policy. It was construed to require in all cases the insertion of the names of the persons interested, or of the names of the agents, as agents for the persons interested, who were in that case also required to be named in the policy. Pray *v.* Edie, 1 T. R. 313; Cox *v.* Parry, 1 T. R. 464; Wilton *v.* Reaston, Park on Ins. 19. This statute was repealed and superseded by 28 Geo. 3, ch. 56. which is now in force. The construction given to this statute is very liberal. Wolff *v.* Horncastle, 1 B. & P. 316; Bell *v.* Gilson, id. 345. All that is necessary to answer its requirements, is that the name of the party effecting the policy be inserted. This person in England is usually an insurance broker. It is not necessary that he should appear to sign as agent. De Vignier *v.* Swanson, 1 B. & P. 346, n. See also, Hibbert *v.* Martin, 1 Camp. 538; Hagedorn *v.* Oliverson, 2 M. & S. 485.

[3] De Forest *v.* Fulton F. Ins. Co., 1 Hall, 84; Waters *v.* Monarch Life and Fire Ins. Co., 5 Ellis & B. 870, 34 Eng. L. & Eq. 116. In Sunderland Marine Ins. Co. *v.* Kearney, 16 Q. B. 925, 6 Eng. L. & Eq. 312, the policy stated that Kearney had represented to the company that he was interested in, or duly authorized as owner, agent, or otherwise, to make the assurance. It was held that an action might be brought on the policy by all the parties interested. The following citation will show the ground on which the decision proceeded: "It seems to us that they covenanted to pay to the persons who were interested in that subject-matter and for whom the policy was effected; *certum est quod certum reddi potest.* A designation which cannot be mistaken is, for this purpose, as good as the actual name of the individual. The company engaged to make good all losses and damages which might happen to the subject-matter of the said policy in respect of three hundred pounds assured. To whom were they to make good? necessarily to the parties interested in the subject-matter who were damnified by the loss. These parties were the assured, and accordingly the stipulations of the policy by the company are with the assured."

In Duncan *v.* Sun Ins. Co., 12 La. Ann. 486, the general rule was thus stated by

phrase, however, applies only to those who were contemplated at the time of the insurance; and who then had an insurable interest in the subject-matter.[1] But it is not necessary that a specific party be intended, if the intention is to cover generally those who have insurable interests; for the intention of the insured, or of the named party, determines the application of this clause. And if A effects insurance in his own name, a payment of a loss to him will exonerate the underwriters.[2]

It has been contended that a mutual insurance company cannot insure parties who have no interest in the subject-matter insured, and cover the interest of the owners under the general phrase, for whom it may concern, on the ground that such insurance would not give the office the right to deduct from the amount of the loss what might be due from the owner of the property from other transactions. But this objection has been held to be of no force, as there would be no practical difficulty in making the adjustment.[3]

The intention of the party who effects the insurance, determines the application of this clause, where insurance has been effected by him without previous authority, and the validity of the insurance depends on a subsequent ratification. And to

the court: "If, upon a general survey of the provisions of the policy and the circumstances under which it was procured, it appears that the intention of the company was to insure for the benefit of any person in interest, although not named, the common interest of the parties shall not be defeated for the want of technical or even customary phrases. If, on the other hand, the most natural construction of the policy is that the party named as assured only sought to protect his own interest, the contract is not to be extended so as to cover the interest of a third person."

[1] Routh *v.* Thompson, 11 East, 428; Bauduy *v.* Union Ins. Co., 2 Wash. C. C. 391; Catlett *v.* Pacific Ins. Co., 1 Paine, C. C. 594; Haynes *v.* Rowe, 40 Maine, 181; Protection Ins. Co. *v.* Wilson, 6 Ohio State, 553; Seamans *v.* Loring, 1 Mason, 127; Lambeth *v.* Western F. & Mar. Ins. Co., 11 Rob. La. 82; Alliance Mar. Assurance Co. *v.* Louisiana State Ins. Co., 8 La. 1, 11; Frierson *v.* Brenham, 5 La. Ann. 540. In Newson *v.* Douglass, 7 Harris & J. 417, 450, *Buchanan*, C. J., said: "'Whom it may concern' is a technical phrase, common to policies of insurance, and is understood to mean, not any and everybody who may chance to have an interest in the thing insured, but such only as are in the contemplation of the contract. Such a policy supposes an agency, and proceeding upon that ground, looks only to the principal in whose behalf, or on whose account, the agent moves in the transaction; and he, for whose benefit the insurance is procured, is the person in the contemplation of the contract, — is he, whom it alone concerns."

[2] Hermann *v.* La. State Ins. Co., 7 La. 502.

[3] Cobb *v.* New England Mut. Mar. Ins. Co., 6 Gray, 192.

make a ratification of any avail, it is necessary that the insurance should have been made for the benefit of the party ratifying the same.[1] If, however, there was a previous authority, the intention of the party ordering the insurance, or giving the authority, must determine whose interests are governed by the general clause.[2]

"On account of owners," means any one intended who is an owner of the subject-matter insured.[3] And if the phrase be "on account of whom it may concern at the time of loss," they will be covered who then own the property, although many assignments have been made subsequent to the insurance.[4] If one owns different parts in different rights, as owner, consignee, trustee, etc., all are covered by an insurance in his own name.[5] And if he has any interest, of any kind, in the subject-matter of the insurance, which comes within the description in the policy, the insurers are liable, whatever may have been the nature of his interest or his intention.[6]

[1] Buck *v.* Chesapeake Ins. Co., 1 Pet. 151; Bauduy *v.* Union Ins. Co., 2 Wash. C. C. 391; Newson *v.* Douglass, 7 Harris & J. 417, 451, per *Buchanan*, J.; De Bollè *v.* Pennsylvania Insurance Co., 4 Whart. 68; Hagedorn *v.* Oliverson, 2 M. & S. 485.

[2] Newson *v.* Douglass, *supra;* Holmes *v.* United Ins. Co., 2 Johns. Cas. 329.

[3] Catlett *v.* Pacific Ins. Co., 1 Paine, C. C. 594, 1 Wend. 561. See also, Foster *v.* United States Ins. Co., 11 Pick. 85.

[4] Rogers *v.* Traders' Ins. Co., 6 Paige, 583.

[5] Carruthers *v.* Sheddon, 6 Taunt. 14, 1 Marsh. 416; Hiscox *v.* Barrett, cited 16 East, 145; Columbian Ins. Co. *v.* Lawrence, 2 Pet. 25; Oliver *v.* Greene, 3 Mass. 133; Millaudon *v.* Atlantic Ins. Co., 8 La. 557; Wolff *v.* Horncastle, 1 B. & P. 316; Irving *v.* Richardson, 2 B. & Ad. 193. Also, Murray *v.* Columbian Ins. Co., 11 Johns. 302. In this case the plaintiff, who was the owner of two thirds of a cargo, insured the whole in his own name, and on his own account. He claimed to have a lien upon the other third. It was decided that he had not, and, on that ground, that his insurance covered only the two thirds.

[6] Wolff *v.* Horncastle, 1 B. & P. 316. In this case A consigned a cargo to B, and drew bills upon him to the amount of it in favor of C, his general agent. A sent these bills, together with the bills of lading to C, desiring him to transmit them to B, that B might have an opportunity of insuring. He also drew a bill for £300 on C, which C accepted and paid. B refused to take the consignment, or accept the bills drawn upon him. C then effected a policy in his own name, with the general clause of the English policy, and informed A thereof, who approved of his conduct. It appeared that the intention of C in effecting the insurance was to cover, not his own interest, but that of the consignor. In an action by C upon the policy, averring in one of the counts an interest in himself, it was held that he had an insurable interest to the amount of £300, the extent of his lien. Lord *Ellenborough*, in the subsequent case of Conway, *v.*

Where the expression "all whom it may concern," or the like, covers many persons whose interests are not strictly joined, as partners,[1] but several, as part owners or tenants in common, each may sue as on an independent policy made to him, unless the policy itself shows a joint contract. So also where different individuals are insured in the same policy for distinct sums, and upon distinct interests.[2]

And a policy insuring A. B. "for ——," is one "for all whom it may concern," provided this blank were intended to be filled, but not otherwise.[3]

And insurance of A, "as agent for B," confines the policy to the interest of B, although, when B directed the insurance, he intended it for another.[4]

But if the nominal assured be described as "agent" generally, this is equivalent to "for whom it may concern."[5] And if the policy contains a designation applicable to many persons, the intention of the insured must determine who is covered.[6]

In this country, a policy made in any form, by which in substance and effect, the party named is insured not for himself but for others, although it may, and sometimes must, be sued in the name of the party named, gives to the insurers no right to make

Gray, 10 East, 536, 546, deemed it "very questionable whether any policy which is effected clearly to cover the interest of the consignor can be applied to protect the interest of the consignee." This doubt, however, seems not to be justified. The case itself established no such doctrine. Neither does the case of Toppan *v.* Atkinson, 2 Mass. 365, establish a doctrine in conflict with that laid down in Wolff *v.* Horncastle. The plaintiff, in this case, expecting goods to be shipped to him as owner, insured them in his own name. Other goods were consigned to him on account and at the risk of the shippers. The plaintiff was only the general creditor of the shippers, and consequently had no lien upon the goods, and no insurable interest. See Turner *v.* Burrows, 8 Wend. 144; 2 Duer. Ins. 39.

[1] In which case the policy is not applicable to the separate interest of either. Cohen *v.* Hannam, 5 Taunt. 101.

[2] Aldrich *v.* Equitable Safety Ins. Co., 1 Woodb. & M. 272; Blanchard *v.* Dyer, 21 Maine, 111.

[3] Turner *v.* Burrows, 8 Wend. 144, 150, 24 Wend. 276, per *Walworth*, Ch.

[4] Russell *v.* N. Eng. Mar. Ins. Co., 4 Mass. 82.

[5] Davis *v.* Boardman, 12 Mass. 80. In this case the policy stated that "A. B. or as agent, doth make insurance," etc. The insurance had been effected for A. B. and another joint owner. Held that A. B. might recover the whole amount insured in his own name for the use of himself and the other joint-owner. Where one insures "as agent" no interest of his own would be covered.

[6] Carruthers *v.* Sheddon, 6 Taunt. 14; Church *v.* Hubbart, 2 Cranch, 187, 197.

any defence applicable to him, and not to the parties actually in interest.[1]

An agent, causing insurance to be made, must have full powers to do so. This authority may be derived from and proved by the circumstances of the case or usage.[2]

But a mere general authority, even to act in relation to a ship is not enough; for a "ship's husband," as such, cannot insure for the owners, without special authority from them.[3] Nor can a master who is sailing a vessel on shares, insure the interest of the owners in the freight.[4]

The general principles of adoption and ratification of contracts, apply to contracts of insurance. Hence, if a policy be made by one who purports to be an agent, the party whom the agent intends as principal, may ratify the act of him, who had no previous authority to be his agent, and by such ratification, although it be after a loss, may confirm and adopt the contract of insurance.[5] And it has been held that the bringing an action on the policy by the principal in his own name, is sufficient evidence of the ratification of the act of the agent.[6] But if no ratification is shown, and the action is brought in the name of the agent, he can only recover to the extent of his interest.[7] But if the goods are insured by a consignee, or a warehouse-man, who describes them as goods in trust, he can recover not only to the extent of his lien for charges, commissions, etc., but also to the full value of the goods, and the balance will be held in trust for the owner of the goods.[8]

[1] Hurlbert *v.* Pacific Ins. Co., 2 Sumner, 471; Williams *v.* Ocean Ins. Co., 2 Met. 303; Aldrich *v.* Equitable Safety Ins. Co., 1 Woodb. & M. 272; Gordon *v.* Church, 2 Caines, 299.

[2] Barlow *v.* Leckie, 4 J. B. Moore, 8.

[3] French *v.* Backhouse, 5 Burr. 2727; Foster *v.* United States Ins. Co., 11 Pick. 85; Finney *v.* Warren Ins. Co., 1 Met. 16.

[4] Haynes *v.* Rowe, 40 Maine, 181.

[5] Lucena *v.* Craufurd, 1 Taunt. 325, 5 B. & P. 269; Routh *v.* Thompson, 13 East, 274; Hagedorn *v.* Oliverson, 2 M. & S. 485; Steinback *v.* Rhinelander, 3 Johns. Cas. 269, 281, per *Kent*, J.; Watkins *v.* Durand, 1 Porter, 251; Bridge *v.* Niagara Ins. Co., 1 Hall, 247; Loring *v.* Proctor, 26 Maine, 18, 30.

[6] Finney *v.* Fairhaven Ins. Co., 5 Met. 192. See also, Oliver *v.* Commercial Mut. Mar. Ins. Co., 2 Curtis, C. C. 277, 296; Blanchard *v.* Waite, 28 Maine, 51. There was also in this last case further evidence of a ratification, as the premium note, signed by all the owners, was tendered to the insurers.

[7] Foster *v.* United States Ins. Co., 11 Pick. 85.

[8] Waters *v.* Monarch Life & Fire Ins. Co., 5 Ellis & B. 870, 34 Eng. L. & Eq.

If insurance is effected by an agent for account of whom it may concern, it is clear that the agent may bring an action on the policy in his own name;[1] yet as this "is upon the presumption that his agency is continued, and not disavowed by the party in interest," he cannot maintain the action if his authority is disavowed by the real party in interest before suit is brought, unless the agent has a lien or other interest in the property, which the person whose property is insured cannot defeat.[2]

The policy may expressly provide, that it shall be defined, especially as to the property insured, by declarations or statements to be subsequently made. A policy of this kind is called an open or running policy, and is the form most in use by mutual companies.[3] It has been held in a late case that the assured has no right to fill up the indorsement so as to make the contract when completed different from that already made by the body of the policy.[4] But if the insurers agree to alter the terms of the

116. In this case warehouse-men insured merchandise described as "the property of the assured, or held by them in trust, or on commission," in certain specified buildings. A loss having taken place, it was held that the warehouse-men could recover the whole value of the goods insured, and not merely to the amount of their particular interest, and that after deducting their charges they were to hold the balance for the owners of the goods, although the latter had not been informed of the insurance. See also, De Forest *v.* Fulton F. Ins. Co., 1 Hall, 84, 100.

[1] Davis *v.* Boardman, 12 Mass. 80; Ward *v.* Wood, 13 Mass. 539; Copeland *v.* Mercantile Ins. Co., 6 Pick. 198.

[2] Reed *v.* Pacific Ins. Co., 1 Met. 166. If, however, the property insured is owned by several persons, and one of them revokes the power of the agent, this will not prevent his carrying on the suit for the benefit of the others. Copeland *v.* Mercantile Ins. Co., 6 Pick. 198. In Cranston *v.* Philadelphia Ins. Co., 5 Binn. 538, it was held that if an agent pays the premium he has a lien on the policy for it so long as he retains possession of the policy, but if he delivers it up his lien is gone. And although the underwriters are entitled to deduct the premium, if unpaid, from the loss, yet if the agent pays it he cannot stand in their place and claim payment out of the sum due.

[3] Langhorn *v.* Cologan, 4 Taunt. 330; Neville *v.* Merch. & Manuf. Mut. Ins. Co., 17 Ohio, 192; Newlin *v.* Ins. Co., 20 Penn. State, 312; Ralli *v.* Janson, 6 Ellis & B. 422, 36 Eng. L. & Eq. 198.

[4] Entwisle *v.* Ellis, 2 H. & N. 549. Insurance was effected, in this case, on rice "to be declared," warranted free from particular average. The indorsement made by the assured valued each bag separately. The court held that the contract was to be determined as if merely the number of bags insured had been inserted. *Channel*, B., said: "At the time of the making of the policy certain particulars were agreed upon, others were left to be settled. The policy was to be on rice to be warranted free from particular average, to be sent in ship or ships. Something more was wanting to make a binding contract. The parties can only fill up such particulars as were left in blank,

contract by the indorsement, there is no reason why this should not be done.[1] Though it seems that if the insured fill out the indorsement in a different manner from that set forth in the body of the policy, the fact that the underwriters place their initials to the indorsement, is not conclusive evidence of their assent to the alteration.[2] And the true rule we think should be, that the policy and the indorsement should be construed together,[3] unless they are so much in conflict that they cannot be reconciled, in which case the indorsement should govern. A question of some difficulty has arisen in construing policies of this nature as to whether the insurers are obliged when an open policy is given on merchandise to be shipped by a certain route, to indorse all shipments made to the assured by that route. In the present state of the law we can but give the result of the adjudication upon the question in our note.[4]

so as to be consistent with the policy. But the words relied on supply particulars not consistent with the policy, not filling up any blank in the policy, but inconsistent with the terms of it."

[1] In the case of Kennebec Co. *v.* Augusta Ins. & Banking Co., 6 Gray, 204, an open policy was given on "property on board vessel or vessels," etc., "as per indorsements to be made." Subsequently an agreement was made under this policy by the plaintiffs with the agents of the defendants in Boston to insure certain cotton at and from New Orleans to Boston, and to take the risk of fire on land at New Orleans. Some of the cotton was burned at New Orleans. After the news reached Boston the agents made the indorsements on the policy, but added a qualification, which had not been agreed on, and which would have prevented a recovery. It was held that the agents had power to alter the terms of the contract, and that the subsequent qualification, not being a part of the contract, was void, and the defendants were therefore liable.

[2] Entwisle *v.* Ellis, 2 H. & N. 549. *Watson*, B., in this case remarked: "It is said that the indorsement was initialed by the underwriters. But the indorsement is a declaration by the assured, ascertaining the subject of the insurance. The initials merely acknowledge the receipt of the notice, and identify it as a declaration by the insured."

[3] Protection Ins. Co. *v.* Wilson, 6 Ohio State, 553. The policy in this case was indorsed, "Open, Cargo, Steamboat and Canal." By the printed terms, insurance was effected against the perils of the seas, rivers, fire, and overpowering thieves. The following indorsement was made: "$2,000 on cargo, canal boat Ben Franklin, at and from this port, per Miami and Wabash canals to Covington, Indiana." It was held that the policy by the indorsements covered the ordinary risks of canal navigation.

[4] In Douville *v.* Sun Mutual Ins. Co. of New York, 12 La. Ann. 259, the policy, which was on goods and merchandise to be laden on board —— vessels, contained this clause: "This insurance is declared to be on merchandise, as interest may appear,

Alterations made by either party with the consent of the other, are valid.[1] And almost any change, as to parties, subject-

adding ten per cent. to invoices. The risks to attach from the time of shipment, which are to be reported to the insurers (on receipt of invoices) for indorsement." It was afterwards provided that the policy should cover merchandise to the address of the assured from European ports to New Orleans, via Boston or New York, subject to additional premium. One of the members of the firm insured, went to Paris in order to purchase goods, and wrote home that his purchases were made with the exception of a few articles, for which he should wait until the last moment, and that he had retained his passage aboard the steamer Arctic for the 20th of September. Information was given to the insurance office that he was about to leave France with goods by the Arctic, and the company said it was all right, but that they would be compelled to wait the receipt of the invoice in order to indorse this on the policy. The vessel sailed and was lost on the passage, and after the loss was ascertained, a list of the amount of the goods which were purchased in Paris, with their value was obtained from an agent in that city. The evidence rendered it probable that goods to the amount stated, had been packed in the trunks of the person before mentioned, and had been lost with him. No bill of lading was taken, and there was no other evidence that the goods had been shipped as part of the cargo of the vessel. The list of the articles was presented to the insurance company, but they refused to indorse it, or to pay the loss.

The court held that there were as many contracts of insurance as there were indorsements on the policy, and that the delivery of the policy did not constitute a contract to insure any goods that might be sent, and that the contract did not take place till the following things were shown, namely, consent on the part of the plaintiffs, a production of her invoices, and the payment of the premium in her behalf, and a communication of the unusual manner in which these goods were intended to be brought over, namely, in the trunks of a partner of the house as baggage; and on behalf of the company, an agreement to take the risk in that form. In E. Carver Co. *v.* Manufacturers' Ins. Co., 6 Gray, 214, an open policy of insurance was made on goods "lost or not lost on board of any steamer or steamers, at and from New York to New Orleans; all sums placed at risk under this policy are to be indorsed thereon." A shipment of goods was made to New Orleans on board a steamer from New York, and the goods were lost by a peril of the sea, and the loss was known to the assured before he, acting with reasonable diligence, had caused the risk to be indorsed on the policy. The court held that if the assured intended in good faith to have the risk covered by the policy, the insured were bound to indorse it. See also, post, ch. 6.

[1] Laird *v.* Robertson, 4 Brown, P. C. 488; Robinson *v.* Tobin, 1 Stark. 336. In Merry *v.* Prince, 2 Mass. 176, it was held that an indorsement on the policy substituting one underwriter for another was binding on the substituted underwriter and the assured, although it was only signed by the insurance broker. In Warren *v.* Ocean Ins. Co., 16 Maine, 439, the alteration was inserted in the policy by consent of both parties, but not signed. It was held valid. But the question has arisen whether a parol agreement to make an alteration is binding. In Head *v.* Providence Ins. Co., 2 Cranch, 127, 168, the charter of the company required that contracts for insurance should be in writing, signed by the president and secretary, and the court therefore held that a contract to cancel or vary a policy must be evidenced in the same way. See also, Cockerill *v.* Cincinnati Mut. Ins. Co., 16 Ohio, 148; Kaines *v.* Knightly, Skin. 54; and cases ante, p. 20, n. 1. But, as we have seen, that a parol contract for insurance is valid, it follows that the policy may be altered by parol. In Kennebec Co. *v.*

matter, or terms, may be made by indorsement with consent. But a material alteration by the insured without the consent of the insurer concerned, destroys all claims against him, although it were made in good faith, and with the expectation of getting his consent.[1] But the alteration to have this effect must be material,[2] and made by the insured or by his procurement or consent.[3] And if the insured strike out the signature, or other material words, this is a cancelling of the policy by him.[4]

It may be added, that an alteration by the insurers, without the consent of the insured, has no effect whatever.[5] Although, after the policy is made both parties may agree to rescind it, yet the fact of the company's becoming insolvent and voting to cancel their policies and giving notice of the same to the assured does not put an end to the contract, unless the assured assents to the rescission.[6]

If there be a material mistake in the policy, it cannot be cor-

Augusta Ins. & Banking Co., 6 Gray, 204, *Merrick*, J., said: "It is now a perfectly well-settled doctrine, that a written contract may be materially varied and changed by subsequent agreements, orally entered into by the parties, before there has been a breach of its stipulations." Goss *v.* Nugent, 5 B. & Ad. 58.

[1] Langhorn *v.* Cologan, 4 Taunt. 330; Fairlie *v.* Christie, 7 id. 416; Campbell *v.* Christie, 2 Stark. 64; Forshaw *v.* Chabert, 3 Brod. & B. 158, 6 J. B. Moore, 369; Laird *v.* Robertson, 4 Brown, P. C. 488. See Entwisle *v.* Ellis, 2 H. & N. 549, cited *supra*, p. 34, n. 4.

[2] Sanderson *v.* M'Cullom, 4 J. B. Moore, 5; Sanderson *v.* Symonds, 1 Brod. & B. 426, 4 J. B. Moore, 42. In these cases, which were actions against different underwriters on the same policy, the vessel had liberty "to sell, barter, and exchange goods at any of the ports to which, under the terms of the policy, she might proceed during her stay." The insured added the words "and trade," after the words, "during her stay." To this alteration some of the underwriters assented, while others did not. Held, that all were liable because the alteration was immaterial, and they would have been held had no such words been introduced. See also, Falmouth *v.* Roberts, 9 M. & W. 469.

[3] Nichols *v.* Johnson, 10 Conn. 192. See, however, vol. 1, p. 230, n. 1.

[4] Thus in Fairlie *v.* Christie, 7 Taunt. 416, the insured struck out with a pen the time of the warranty of sailing, and inserted in the margin a different time. It was held, that this avoided the policy. See also, cases *supra*.

[5] Kennebec Co. *v.* Augusta Ins. & Banking Co., 6 Gray, 204, cited *supra*, p. 35, n. 1.

[6] Alliance Mut. Ins. Co. *v.* Swift, 10 Cush. 433. In New England Mut. F. Ins. Co. *v.* Butler, 34 Maine, 451, it was held, that a vote of a mutual insurance company that if the assessments upon its premium notes should not be punctually paid, the contracts of insurance previously made by the party failing to pay, should be suspended, was of no validity unless assented to.

rected, nor its effect averted by a court of law.[1] But equity will correct the mistake and treat the policy as reformed. Our notes will show the principles upon which this has been done.[2]

[1] Constable *v.* Noble, 2 Taunt. 403; Kaines *v.* Knightly, Skin. 54; Mellen *v.* National Ins. Co., 1 Hall, 452; Chamberlain *v.* Harrod, 5 Greenl. 420. See also, cases cited in the next note.

[2] Motteux *v.* London Ass. Co., 1 Atk. 545; Collett *v.* Morrison, 9 Hare, 162, 12 Eng. L. & Eq. 171; Hogan *v.* Delaware Ins. Co., 1 Wash. C. C. 419; Flint *v.* Ohio Ins. Co., 8 Ohio, 501; Firemans Ins. Co. *v.* Powell, 13 B. Mon. 311; Dow *v.* Whetten, 8 Wend. 160. The mistake will be corrected whether it be one of law or of fact. Oliver *v.* Commercial Mutual Marine Ins. Co., 2 Curtis, C. C. 277, 299. But in every case the evidence of the mistake must be clear and satisfactory. "There ought to be the strongest proof possible." Per Lord Chancellor *Hardwicke*, Henkle *v.* Royal Exch. Ass. Co., 1 Ves. Sen. 317. See also, Graves *v.* Boston Mar. Ins. Co., 2 Cranch, 419, 441; Lyman *v.* United Ins. Co., 2 Johns. Ch. 630; Gillespie *v.* Moon, id. 585; Phœnix Ins. Co. *v.* Gurnee, 1 Paige, Ch. 278; Woodruff *v.* Columbus Ins. Co., 5 La. Ann. 697. In Andrews *v.* Essex Fire & Mar. Ins. Co., 3 Mason, 6, 10, Mr. Justice *Story* said: "A court of equity ought to be extremely cautious in the exercise of such an authority, seeing that it trenches upon one of the most salutary rules of evidence, that parol evidence ought not to be admitted to vary a written instrument. It ought, therefore, in all cases to withhold its aid, where the mistake is not made out by the clearest evidence according to the understanding of both parties, and upon testimony entirely exact and satisfactory." See also, Franklin Fire Ins. Co. *v.* Hewitt, 3 B. Mon. 231. In Oliver *v.* Commercial Mutual Marine Ins. Co., *supra*, it was said that the courts would interfere much more readily in the correction of a mistake in the execution of a power, than in the reformation of a written contract. In this case the complainant, a merchant in Liverpool, being the owner of a vessel called the Liscard, ordered his agent at Quebec to insure a certain amount on the vessel and her freight in New York. The agent wrote to McLimont, an insurance agent in New York, to procure the insurance. McLimont then wrote to D. R. McKay in Boston to have this done. McLimont did not state any thing in regard to the ownership. McKay made application in the usual form to the defendants. The same day the company sent to him to find out whose name should be inserted in the policy. He thereupon wrote and sent the following: "Policy for D. R. McKay, on Liscard, to be made out on account of A. McLimont, and payable to him or order." The policy was accordingly so made out. After the loss the complainant brought a bill in equity alleging that the words "as agent and for whom it may concern," were omitted after McLimont's name. The court were of the opinion that the mistake arose in the execution of a power, and that the complainant was entitled to have the policy reformed. As the case is one of great importance we give the language of Mr. Justice *Curtis* on the main point, p. 293: "To state fully and precisely the grounds upon which I think this case rests, I should say that when a complete contract for a policy is made by a known agent, and nothing is said respecting any declaration of interest, the contract is to insure the property of his principal, and in order that this contract may take effect, power is impliedly reserved to the agent specially to declare the interest upon which the insurance is to attach, and to have such declaration inserted in the policy, when drawn, or to have the policy drawn so as to insure him as agent, leaving the declaration of interest to be made afterwards, in case of loss. Either is within the known usage of agents and underwriters; and

SECTION III.

OF THE ASSIGNMENT AND NEGOTIABILITY OF POLICIES OF INSURANCE.

Policies of insurance are not negotiable instruments, either in England or in this country,[1] but they may, like *choses in action*, generally be assigned so as to give the assignee the right of instituting a suit in the name of the assignor. And if the policy be assigned, although without notice to the underwriters, the assignment vests an equitable interest in the assignee.[2] But in such a case the general rule is, that the action must be brought in the name of the assignors.[3]

the conduct of the respondents in sending to McKay to obtain this declaration, and of McKay in making it, show, if any proof were needed, that it was understood by both, he possessed this power. And when a mistake was made in declaring the interest, it was as Lord *Ellenborough* said, a mistake in executing a power reserved to the agent by a complete and binding contract, in which power the underwriter has no interest, save that it should be rightly executed, so that he may obtain the premium, and have a valid title to retain it, and over which he can, justly, exercise no control." There was evidence that McKay purposely, and not through mistake, declared the interest to be in McLimont in order that they might share the scrip dividends. Mr. Justice *Curtis* said: "If this were so, a court of equity could not treat an attempted fraud as an innocent mistake; and though the principal, in such a case, would be in no fault, it could not relieve him, but must leave him to his remedy against his agent." The court were of opinion that though it appeared that they probably intended to take the scrip dividends, yet it did not appear that they intended to take them without the consent of their principal.

[1] Fogg *v.* Middlesex Mut. F. Ins. Co., 10 Cush. 337, 345; Folsom *v.* Belknap Co. Mut. F. Ins. Co., 10 Foster, 231; Hobbs *v.* Memphis Ins. Co., 1 Sneed, 444, 450. By the law of France a policy may be made negotiable by the loss being made payable to order, or to bearer. Emerigon, c. 12, § 2, Ed. 1783, p. 249, 250; 2 Valin, 45; Alauzet, vol. 1, 360; 2 id. 135. But it may be doubted whether in England, or in this country, an assignee of such a policy could maintain an action upon it in his own name. We have seen, ante, vol. 1, p. 138, that a bill of lading "to order or assigns" is not such a negotiable instrument, and a policy of insurance would doubtless be governed by the same rules of law. See also, Skinner *v.* Somes, 14 Mass. 107.

[2] Wakefield *v.* Martin, 3 Mass. 558; Spring *v.* South Carolina Ins. Co., 8 Wheat. 268.

[3] Earl *v.* Shaw, 1 Johns. Cas. 313; Gourdon *v.* Ins. Co. of N. A., 3 Yeates, 327, 1 Binn. 430, n. In Jessel *v.* Williamsburgh Ins. Co., 3 Hill, 88, the insured assigned his interest in the subject-matter with the assent of the underwriters, but did not assign

The right of the assignee, though said to be only equitable, is enforced at law; and, indeed, the assignee will not be permitted to proceed in equity, unless there are especial reasons for his so doing. And it is not a sufficient reason that the action must be brought in the name of the assignor.[1] A parol agreement, together with delivery, will constitute a sufficient assignment of the policy.[2] Generally the assignor of a *chose in action* cannot prejudice the rights of the assignee after the debtor has assented to the assignment.[3] But where the owner of property mortgaged effects insurance in his own name, "loss, if any, payable to the mortgagee," or assigns the policy to the mortgagee with the assent of the insurer, the insurance is upon the interest of the mortgagor, and he does not cease to be a party to the original contract with the insurers, and any act of his which would otherwise render the policy void will have this effect, although the policy is in the hands of the mortgagee.[4] But if the

the policy. The policy contained the usual clause that the interest of the insured should not be assigned without the consent of the corporation. The assignee sued in his own name. The court held, that the action should have been brought in the name of the assignor, and the plaintiff, therefore, was nonsuited. The court said: "We know of no principle upon which the assignee of a policy of insurance can be allowed to sue upon it in his own name. The general rule applicable to personal contracts is, that, if assigned, the action for a breach must be brought in the name of the assignor, except where the defendant has expressly promised the assignee to respond to him." See also, Folsom *v.* Belknap Co. Mut. F. Ins. Co., 10 Foster, 231; Pollard *v.* Somerset Mut. F. Ins. Co., 42 Maine, 221.

[1] Motteux *v.* London Ass. Co., 1 Atk. 545; Dhegetoft *v.* London Ass. Co., Mosely, 83, *nom.* De Ghettoff *v.* London Ass. Co., 4 Brown, P. C. 436; Hammond *v.* Messenger, 9 Sim. 327; Carter *v.* United Ins. Co., 1 Johns. Ch. 463; Ontario Bank *v.* Mumford, 2 Barb. Ch. 596; 1 Parsons on Contracts, 193, n. (*f*).

[2] Powles *v.* Innes, 11 M. & W. 10, 12, per *Parke*, B.; Wells *v.* Archer, 10 S. & R. 412.

[3] Hackett *v.* Martin, 8 Greenl. 77; Hatch *v.* Dennis, 1 Fairf. 244; Matthews *v.* Houghton, id. 420; Frear *v.* Evertson, 20 Johns. 142.

[4] Hale *v.* Mechanics' Mut. F. Ins. Co., 6 Gray, 169; Grosvenor *v.* Atlantic Fire Ins. Co., New York Court of Appeals, June T. 1858, 21 Law Reporter, 308, 7 Am. Law Register, 118. This case overrules Traders Ins. Co. *v.* Robert, 9 Wend. 404, 474; Tillou *v.* Kingston Mut. Ins. Co., 7 Barb. 570, 1 Seld. 405. The case of Boynton *v.* Clinton & Essex Mut. Ins. Co., 16 Barb. 254, may, perhaps, be distinguished on the ground pointed out in the next note. In Buffalo Steam Engine Works [illegible]n Mutual Ins. Co., New York Court of Appeals, 1858, the action was brought by the mortgagee, to whom the policy had been assigned. The owner of the vessel procured the insurance upon her, the underwriter knowing at the time that the owner was indebted to the plaintiff for an engine furnished the vessel; that he was to mortgage the vessel to secure such debt, and that his object in obtaining the policy was to assign it as security for the debt.

insurers, at the time of their assent to the transfer of the policy, impose any further obligations on the transferree, this may be evidence of a new contract with him, and then the acts of the mortgagor cannot affect his rights as transferree.[1]

It is a well-settled rule of law that the assignee of a *chose in action* stands in the place of his assignor. He is liable to have set up against his claim all demands due from the assignor to the original promisor at the time of the assignment, but not subsequent ones. And after the assignment the assignor is treated as having nothing to do with the contract, except that the action must generally be brought in his name. Notice of the assignment must be given to the original promisor.[2]

If notice is given of the assignment, and the insurers consent, and give no notice to the assignee of existing claims held by them against the assignor, this, on general principles, should be held as a waiver of such claims.[3]

The policy contained permission to insure to the extent of $40,000, and to assign the policy. Held, that an over insurance by the owner after the policy was assigned, was fatal to the recovery. But see Pollard *v.* Somerset Mut. F. Ins. Co., 42 Maine, 221.

[1] Foster *v.* Equitable M. F. Ins. Co., 2 Gray, 216. In this case the insurers required, at the time of their assent to the assignment, an agreement of the mortgagee to pay all assessments which should be made against the policy, and that the policy should be subject to the same lien for the payment of assessments as before. The court, per *Bigelow, J.*, said: "The legal effect of this transaction was to create a new, substantive, and distinct contract of insurance with the plaintiffs. They had a separate interest, as mortgagees, to be protected by the policy. For a new and independent consideration, the defendants agreed to insure this interest to the plaintiffs, and thereby the parties assumed toward each other the relation of insurer and insured."

[2] Comstock *v.* Farnum, 2 Mass. 96; Wood *v.* Partridge, 11 id. 488; Jones *v.* Witter, 13 id. 304; Jenkins *v.* Brewster, 14 id. 291; Sweet *v.* Green, 4 Greenl. 384; Hackett *v.* Martin, 8 id. 77; Bartlett *v.* Pearson, 29 Maine, 9; Sanborn *v.* Little, 3 N. H. 539; Dunclee *v.* Greenfield Steam Mill Co., 3 Foster, 245; Raymond *v.* Squire, 11 Johns. 47; Anderson *v.* Van Alen, 12 id. 343; Briggs *v.* Dorr, 19 id. 95; Johnson *v.* Bloodgood, 1 Johns. Cas. 51; Andrews *v.* Beecker, id. 411; Wood *v.* Perry, 1 Barb. 114, 131; Murray *v.* Lylburn, 2 Johns. Ch. 441; Guerry *v.* Perryman, 6 Ga. 119; Norton *v.* Rose, 2 Wash. Va. 233. These principles are applicable to the contract of insurance. Rousset *v.* Ins. Co. of N. A., 1 Binn. 429; Gourdon *v.* Ins. Co. of N. A., 3 Yeates, 327, 1 Binn. 430, n.

[3] Mowry *v.* Todd, 12 Mass. 281, 283; King *v.* Fowler, 16 id. 397; Henry *v.* Brown, 19 Johns. 49; Merrill *v.* Merrill, 3 Greenl. 463; Stiles *v.* Farrar, 18 Vt. 444; Wiggin *v.* Damrell, 4 N. H. 69; Thompson *v.* Emery, 7 Foster, 269. See also, Phillips *v.* Merrimack Mut. F. Ins. Co., 10 Cush. 350, 354. In Gourdon *v.* Ins. Co. of N. A., 3 Yeates, 327, 1 Binn. 430, n., there was some evidence that notice of the assignment had been given to the insurers and that they had assented thereto. *Shippen*, C. J., charged the jury as follows: "I take it to be likewise incumbent on the assignee of a

If a person, acting in behalf of the owners of a vessel, effects insurance upon it in his own name on account of whom it may concern, and the policy is afterwards assigned, the assignee will take subject to such rights as existed between the owners and the underwriters.[1] In these cases of the assignment of the policy, the interest in the property insured remains in the original assured. The policy may, however, be made assignable with the subject of insurance; as when the loss is made payable to the insured, "or any other person who may be the owner at the time of the loss." In this case a transfer of the property and of the policy gives the transferree all the rights of the party originally insured.[2]

The mere assignment, however, or sale of the property insured, gives no right to the assignee or purchaser to sue the insured for a subsequent loss of the property, but it will suffice

policy to call upon the underwriter, and inform him before any account of a loss, and to know if he has any thing to set off against the policy, in case a loss should happen. If the underwriter had this notice, and either makes no objection or claim, or is totally silent as to any claim, I should consider the assignee of the policy in the same condition, as the assignee of a bond under the same circumstances, and that both are entitled to recover, notwithstanding the underwriter on the policy, or the obligor in the bond, should afterwards discover that they had a counter demand, and that their mouths are stopped by their acquiescence or silence, otherwise in both cases it would lead to a deception." But in Mangles *v.* Dixon, 3 H. L. Cas. 702, 18 Eng. L. & Eq. 82, it was held to be the duty of the assignee of a *chose in action* to inquire as to the equities arising upon it, and that the creator of the security was not bound on receiving a simple notice of the assignment to volunteer information, unless the notice disclosed, on its face, that which should induce the belief that the assignee had been deceived in accepting the assignment.

In Wiggin *v.* American Ins. Co., 18 Pick. 158, the policy contained the following clause: "In case of loss, such loss shall be paid in sixty days after proof and adjustment thereof, the amount of the premium note, if unpaid, and all sums due to the company from the insured when such loss becomes due, being first deducted." The policy was assigned with the consent of the company, "reserving their rights expressed in the policy." This clause was held to give the company the right to deduct all claims due from the assignors whether prior or subsequent to the assignment. But in the case of Wiggin *v.* Suffolk Ins. Co., 18 Pick. 145, it appearing that by virtue of two policies made prior to the assignment there was a loss due from the company to the assignors, the court held, that as the company had a right, on the liquidation of those losses, to deduct all premium notes due to the office, as well those afterwards, as those previously made, the company could only claim from the assignees the balance remaining, if any, after such deduction. See also, ante, p. 32, n. 6.

[1] Waters *v.* Allen, 5 Hill, 421.

[2] Rogers *v.* Traders Ins. Co., 6 Paige, Ch. 583.

to destroy the claim of the original insured, and thus wholly discharge the insurer,[1] but subject perhaps to the revival of his

[1] It is certain that in England and the United States, an ordinary policy of insurance does not pass to the assignee of property insured as an incident to the property. Powles *v.* Innes, 11 M. & W. 10. See also, Godin *v.* London Assur. Co., 1 Burr. 489; Fogg *v.* Middlesex Mut. F. Ins. Co., 10 Cush. 337, 345; King *v.* Preston, 11 La. Ann. 95. In France the law seems to be different. Emerigon, ch. 16, sect. 3. It is equally certain that the original assured has no claim upon the policy, if at the time of the loss, his interest in the subject of insurance has passed from him by an assignment. It has however been questioned whether an assignment of the policy, together with the property insured, would not give to the assignee a right of suing upon the policy, in the name of the assignor. Thus *Tindal*, C. J., in the case of Sparkes *v.* Marshall, 2 Bing. N. C. 774, 3 Scott, 172, the facts of which it is unnecessary to state, says: "If the plaintiff had an insurable interest at the time the policy was effected, whatever change may have taken place in the property in the oats since, can have no effect in relieving the underwriters from their liability, as the plaintiff may sue on the policy for the benefit of the party to whom such property has passed. We are not aware of any principle on which a change in the interest, after the policy is effected, much less after the loss has happened, can be set up as an answer by the underwriters against a claim for such loss." This expression of opinion was entirely unnecessary to the decision of the case. In fact there had been no transfer or change in the property at all, only an assignment of the policy after a loss. Much more weight is given to these remarks of Chief Justice *Tindal*, than it would seem they deserve, in the subsequent case of Powles *v.* Innes, 11 M. & W. 10. In this case insurance had been effected for two of three part-owners. Before a loss one part-owner transferred his share to the uninsured part-owner. There was no transfer of the policy. It was held that the policy did not pass as incident to the property, and hence that there could be no recovery in the name of the assignors. But it was intimated by *Parke*, B., that, "if the policy had been handed over with the bill of sale, or there had been an order to the brokers to hand it over, the case would be different; then the parties might sue as trustees for the purchaser." It seems to have been taken for granted in Spring *v.* South Carolina Ins. Co., 8 Wheat. 268, and in Rousset *v.* Ins. Co. of North America, 1 Binn. 429, that the insurers would be liable in such cases. Mr. Phillips expresses the opinion that the policy is assignable with the subject of insurance, provided it contain no provision to the contrary. 1 Phillips on Insurance, sect. 77, 88. Mr. Duer, with Powles *v.* Innes in mind, cautiously avoids expressing an opinion upon the point. 2 Duer on Ins. 54. See also, 3 Kent's Com. 261. Notwithstanding these authorities, we doubt whether this position be tenable. Some confusion has arisen from confounding the assignability of the policy itself, where there is no assignment of the subject, with the case where both policy and subject are assigned. The assignment of the policy alone stands upon the ordinary ground of an assignment of a chose in action. The assignment of the subject, however, raises a very different question. The contract of insurance is strictly a personal one. "It cannot properly be called insuring the thing, for there is no possibility of doing it, and it therefore must mean insuring the person from damage." Per Lord *Hardwicke*, in Sadler's Co. *v.* Badcock, 2 Atk. 554, 556. It is not an engagement to insure property from loss irrespective of ownership, but to answer for losses accruing to a certain person, upon a certain subject. Where the interest of the assured ceases, the policy becomes inoperative for the want of a

obligations, if the property returns to the original insured before the loss,[1] but not to make the insurer liable for losses occurring while the property was out of the hands of the original insured.

An insured may sell the property, it is said, and agree to retain it as the trustee of the purchaser, and then may hold the policy for his benefit.[2] But this rule must be limited to the case where the agreement gives the original insured an insurable interest in the thing sold.[3] And if the sale be conditional, the seller may

subject belonging to the assured to operate upon. If at the time of the assignment of the policy and of the subject of insurance, there is an agreement on the part of the assignor to bear the risk, an insurable interest would remain in the original assured, and the policy would be sustained by that interest, and made available to the assignee. Certainly it could never be maintained that an insurance would be made good to the assignee of both subject and policy, where a change of possession followed a transfer of title. The character of the person having the control of property would certainly be held, in such a case, to be a material element in the risk. Where however the transfer of property does not in any way affect the risk, the great technical difficulty remains, that the underwriters have engaged to insure against loss the original assured, and not his assignee. It is difficult to perceive upon what principles the opposite view can be supported. The view that we take of this subject is supported by the authorities. "A man who has sold property insured and received its equivalent in the price, cannot be said to suffer when the property is destroyed, nor can the purchaser avail himself of the insurance, because no contract was made with him, unless the insurer assents to the transfer and agrees to continue his liability." Per *Parker*, C. J., in Gordon *v.* Mass. Fire & Mar. Ins. Co., 2 Pick. 249, 258. See also, Sadlers' Co. *v.* Badcock, 2 Atk. 554; Lynch *v.* Dalzell, 4 Brown, P. C. 431; Carroll *v.* Boston Mar. Ins. Co., 8 Mass. 515, per *Parker*, C. J.; Lazarus *v.* Commonwealth Ins. Co., 5 Pick. 76, 81; Wilson *v.* Hill, 3 Met. 66; Bell *v.* Firemen's Ins. Co., 3 Rob. La. 423, 427; Ætna Fire Ins. Co. *v.* Tyler, 16 Wend. 385; Franklin Fire Ins. Co. *v.* Findlay, 6 Whart. 483, 498, per *Kennedy*, J.

[1] In Power *v.* Ocean Ins. Co., 19 La. 28, the policy contained the clause that in case of the transfer of the property, and the termination of the interest of the insured, the policy should be void. It was held that if the property was sold, but reverted to the original insured, so that he was in possession at the time of the loss, the underwriters were liable. The point seems to have been taken for granted to be settled the other way in Cockerill *v.* Cincinnati Mut. Ins. Co., 16 Ohio, 148. After the policy was made the boat was seized on execution and sold; but the defendants verbally agreed to waive the forfeiture if the boat should come into the possession of the plaintiff before the termination of the risk. The plaintiff then bought her, and held her at the time of the loss. Held that the agreement was not binding, and the defendants were not liable. If the transfer makes the policy merely inoperative and not void, there seems to be no reason why the policy, in the absence of an express stipulation, may not revive in case of a repurchase, unless the risk had been changed. See the remarks of *Bronson*, C. J., in Howard *v.* Albany Ins. Co., 3 Denio, 301, 303.

[2] Powles *v.* Innes, 11 M. & W. 10, per *Parke*, B., and *Abinger*, C. B.

[3] See Reed *v.* Cole, 3 Burr. 1512.

still hold the policy for his own interest, as mortgagor, or the like, provided he remains in possession, and no entry is made for foreclosure.[1]

The insurers have the right of personal selection; they may be willing to insure for one person and not for another; and therefore the usual clause, that the policy shall be void if assigned without their consent, is certainly valid,[2] whatever may be the right of transfer in the absence of this clause.[3] But it seems that

[1] Stetson *v.* Mass. Mut. F. Ins. Co., 4 Mass. 330; Gordon *v.* Mass. F. & M. Ins. Co., 2 Pick. 249; Lazarus *v.* Commonwealth Ins. Co., 5 Pick. 76, 81; Jackson *v.* Mass. Mut. F. Ins. Co., 23 Pick. 418; Higginson *v.* Dall, 13 Mass. 96; Rice *v.* Tower, 1 Gray, 426; Holbrook *v.* Am. Ins. Co., 1 Curtis, C. C. 193; Rollins *v.* Col. Ins. Co., 5 Foster, 200; Folsom *v.* Belknap Co. Mut. F. Ins. Co., 10 Foster, 231. In Vermont it seems to be doubted whether a mere mortgage would not be an alienation. Tittemore *v.* Vermont Mut. F. Ins. Co., 20 Vt. 546. In Indiana it is held to be an alienation. M'Culloch *v.* Indiana Mut. F. Ins. Co., 8 Blackf. 50; Indiana Mut. F. Ins. Co. *v.* Coquillard, 2 Cart. Ind. 645. But it seems well settled, both on principle and on authority, that it is not. See cases *supra*, also Bell *v.* Western M. & F. Ins. Co., 5 Rob. La. 423; Hibbert *v.* Carter, 1 T. R. 745; Alston *v.* Campbell, 4 Brown P. C. 476; Reed *v.* Cole, 3 Burr. 1512; Pollard *v.* Somerset Mut. F. Ins. Co., 42 Maine, 221. In McLaren *v.* Hartford F. Ins. Co., 1 Seld. 151, it was held that the interest of the mortgagor is gone after a sale of the mortgaged premises by a master in chancery under a decree of foreclosure, and payment of part of the purchase-money, although the decree was not enrolled, and no deed executed by the master at the time of the sale. But in Bragg *v.* New England Mut. F. Ins. Co., 5 Foster, 289, where the insurance was in the name of the mortgagor, but the defendants had agreed by a memorandum on the policy to pay the loss to the mortgagee, it was held that a subsequent foreclosure did not work an alienation. In Morrison *v.* Tennessee M. & F. Ins. Co., 18 Mo. 262, A effected insurance on certain property, and then sold it to B, who reconveyed it to a trustee to secure to A the payment of the purchase-money. It was held that A still retained an insurable interest, and might recover on the policy to the extent of his actual loss. But if A conveys part of the premises to B, and then takes back a lease of the same for five years at a nominal rent, this is an alienation. Boynton *v.* Clinton & Essex Mut. Ins. Co., 16 Barb. 254. In Abbott *v.* Hampden Mut. F. Ins. Co., 30 Maine, 414, where the policy declared that an alienation in whole or *in part* should avoid the policy, a *feme covert* was tenant for life in one third of a lot of land, and tenant for a term of years in the rest. Her husband erected a house on the land, and caused it to be insured as his property. The husband and wife then conveyed to the reversioner the life estate of the wife on condition that he should pay her a fixed sum annually during her life. The husband, at the same time, conveyed all his interest in the estate for years, and took back a mortgage upon the whole lot to secure the payment of several sums in yearly instalments. The mortgagor entered into possession. The house was destroyed before any of the sums became payable. Held that the conveyances amounted to an alienation.

[2] Lazarus *v.* Comm. Ins. Co., 5 Pick. 76, 81, and cases cited in the preceding notes.

[3] See *supra*, p. 43, n. 1.

this clause does not apply to a case of bankruptcy or insolvency,[1] whether the property and policy were taken out of the hands of the insured by force or act of law, or by his own voluntary assignment in trust for creditors.[2]

Whether a sale and transfer by one partner to another, of his interest in insured property belonging to the firm, is an alienation which discharges the insurers, may not be certain on the authorities; but we think that the principles of insurance law lead clearly to this conclusion.[3] And, in general, upon the death

[1] But see, *contra*, Adams *v.* Rockingham Mut. F. Ins. Co., 29 Maine, 292.

[2] An ordinary assignment for the benefit of creditors, constitute the assignees agents, as it were, of the assignors. Adams on Equity, 31. Such a transfer would not destroy the interest of the original insured, and hence such an assignment would not work an alienation. Gourdon *v.* Ins. Co. of N. A., 3 Yeates, 327, 1 Binn. 430, note; Gordon *v.* Mass. F. & M. Ins. Co., 2 Pick. 249; Lazarus *v.* Commonwealth Ins. Co., 19 Pick. 81. But where the assignment was made on the condition, that the creditors, for whose use it should be made, should release and discharge the debts, and they were so released and discharged, it was held that the whole interest of the insured in the property was gone. Lazarus *v.* Commonwealth Ins. Co., 5 Pick. 76. See also, Dadmun Manuf. Co. *v.* Worcester Mut. F. Ins. Co., 11 Met. 429.

[3] This question has been much discussed in New York, and the cases are to some extent irreconcilable. It is well-settled that if A & B are joint-owners, or partners, and A sells out his interest to B, no action can be brought in the names of A & B for B's benefit. Murdock *v.* Chenango Co. Mut. Ins. Co., 2 Comst. 210; Howard *v.* Albany Ins. Co., 3 Denio, 301; Ferriss *v.* North America F. Ins. Co., 1 Hill, 71; Tillou *v.* Kingston Mut. Ins. Co., 1 Seld. 405, reversing same case in the Supreme Court, 7 Barb. 570. See also, McMasters *v.* Westchester Co. Mut. Ins. Co., 25 Wend. 379. In many of these cases it was directly asserted that such a transfer works an alienation. It is to be observed, however, that there is now a statute in New York which provides that assignees must sue in their own names, and that formerly, to some extent, the acts, under which the insurance companies were incorporated, contained a similar provision. It may therefore, perhaps, be that these cases were decided on this point, and that the expressions of opinion as to the question of partnership are to be regarded as mere *dicta*. For it has been held that where A & B are partners, and effect insurance, and A sells out to B, and after a loss B assigns the claim to C, that C may sue in his own name. Wilson *v.* Genesee Mut. Ins. Co., 16 Barb. 511. And in Dey *v.* Poughkeepsie Mut. Ins. Co., 23 Barb. 623, it was held that, where A. & B. were partners and effected an insurance, and afterwards A sold out his interest to B and C, the policy was made null and void, the court said: "If this assignment had simply been from one of the assured to the other, they being partners, it would not, for the reasons stated by *Roosevelt*, J., in Wilson *v.* Genesee Mut. Ins. Co., 16 Barb. 511, have affected the policy. But as it is the company are called upon to litigate with a party with whom they had not contracted, and which their policy protected them against." In Tennessee it is held that if two partners effect insurance, and one sells out to the other, an action in the name of both will lie to recover the original share of the vendee, but the interest of the vendor cannot be recovered. Hobbs *v.* Memphis

of the insured, the policy will go with the property insured, either to a legatee or the next of kin, and will be held by the executor or administrator as a trustee until distribution;[1] nor will this clause prevent the insured from making a valid assignment of his claim after a loss has happened.[2] But whether the parties

Ins. Co., 1 Sneed, 444. In Dreher *v.* Ætna Ins. Co., 18 Mo., 128, it was held that a dissolution of partnership before loss, and a division of the goods, so that each partner owned a distinct portion, was a change of title within the meaning of the clause, "any transfer or change of title in the property insured shall avoid the policy."

The argument used in favor of not considering the sale by one partner to another as an alienation, is chiefly that no new party is introduced into the contract, and as the insurer was willing to trust the partnership, and to insure their property, he is not prejudiced in any way by such a sale. But the answer to this is obvious. The presence of one or more particular persons in the firm may be the reason why the insurer was willing to take the risk. He may have said, "A is an honest, trustworthy man, the other members of the firm I have my doubts about, but as long as A remains in the firm I am willing to trust it." Can it be said, then, that if A sells out to B and C the insurer is not prejudiced. Again, if one partner sells out to the others, the partnership is by operation of law dissolved, and admitting that the insurer did not, as in the case just supposed, rely upon one partner, yet it must then be said that he insured the firm, and as this has ceased to exist, he is no longer liable. On principle, if A & B are insured, and A assigns his interest to B, no action should lie in the name of A & B, for A has no interest, and the assignment has not been by consent, which is the evidence of a new contract by the insurer to pay the loss, and, except in New York, an assignee cannot sue in his own name.

[1] If the insured dies intestate, his death works no alienation, because his heirs take by descent, and not by any act of his. Burbank *v.* Rockingham M. F. Ins. Co., 4 Foster, 550. The question has arisen whether, in case of a devise of real estate, the policy goes to the devisee, or to the administrator as personal estate. The latter seems to be the more correct view. This is shown by the case of Haxall *v.* Shippen, 10 Leigh, 536. The testator insured his house against fire by a policy to himself, his heirs, and assigns. He then devised the tenement to his wife for life, remainder to his two daughters in fee. After his death the house was destroyed by fire. The wife received the money, and, without the concurrence of the other devisees, expended it in a new house. She then died, leaving the new house standing, which went with the estate to the devisees in remainder. Held that the tenant for life had a right only to the use of the money during her life, it being but personal estate, and that she had no right to convert it into real estate, and that on her death the husbands of the devisees in remainder had a right to call for the whole insurance money, without any deduction being made for the value of the new building. But in cases where a trust existed, or was presumed to exist, the proceeds have been considered not as personal estate, but as "affected with a trust for the benefit of the parties interested in the real estate." Parry *v.* Ashley, 3 Sim. 97; Norris *v.* Harrison, 2 Madd. Ch. 268. See also, Mildmay *v.* Folgham, 3 Ves. 471.

[2] Sparkes *v.* Marshall, 2 Bing. N. C. 761; Brichta *v.* N. Y. La Fayette Ins. Co., 2 Hall, 372; Dadmun Manuf. Co. *v.* Worcester Mut. F. Ins. Co., 11 Met. 429, 435; Mellen *v.* Hamilton F. Ins. Co., 5 Duer, 101.

may, if they see fit, stipulate that such an assignment shall invalidate the policy, is, on the authorities, a matter of doubt.[1]

The policy may provide that not only must the insurers be notified of a change of ownership, but that they must be informed of a change of masters. And if the vessel, in such a case, is lost while under the charge of a master, of whose appointment the insurers have not been informed, the insured cannot recover, although it does not appear that there was any negligence on the part of such captain.[2]

SECTION IV.

OF THE CONSTRUCTION OF POLICIES OF INSURANCE.

A. *Of the General Rules of Construction.*

A discussion of the rules and principles applicable to the construction of contracts generally, would be out of place here; but if we confine our consideration to those which belong exclusively to policies of insurance, a few words will suffice. Perhaps the middle and the better ground will be to present those rules which have been passed upon juridically in connection with contracts of insurance.

The most important question is, whether the contract should be construed favorably to one party or to the other. And it is obvious that the answer to this question must depend, in some

[1] In Goit *v.* National Protection Ins. Co., 25 Barb. 189, decided in April 1855, this question came before the supreme court of New York, *Allen*, J., *Pratt*, J., *Hubbard*, J., and *Bacon*, J., being upon the bench, and it was held that the clause, so far as it affected the right of the assured to transfer his interest after a loss, was void as against public policy. In March, 1857, the same question came before the same court, *Strong*, J., *Welles*, J., and *Smith*, J., being upon the bench, and the clause was held to be valid, no notice being taken of the preceding case. Dey *v.* Poughkeepsie Mut. Ins. Co., 23 Barb. 623. It will appear from the numbers of the volumes above cited, that the case of 1857, which held this clause to be valid, was published some time before the case in 1855, which declared it to be void.

[2] Tennessee Marine & Fire Ins. Co. *v.* Scott, 14 Mo. 46.

measure at least, upon the predominance given to one or the other of the two views which a general consideration of the subject of insurance at once suggests.

The practice of insurance is of vast benefit to the commercial world. It binds it together in a kind of community. It divide losses and profits. It begins with taking by way of premium a small part of the profits; and, in return, it divides all losses in such a way as to make them endurable by all. Hence, mercantile enterprises become practicable and prudent, which would never be undertaken if a disastrous issue must fall with crushing force upon the undertakers. Men of small capital are safe in carrying on a comparatively large business; and commerce generally is thus enlarged and protected by the practice of insurance.

It is easy to see this so clearly, that the desire becomes very strong to extend the benefits of insurance as widely as possible, by making it divide all losses, and provide indemnity for every disaster. And it is easy, in seeing this, to forget, as juries often, and courts sometimes do, that if by lax construction, or in any other way, the insured are always favored, either [redacted] practice of insurance must cease, or the premiums must be enlarged to cover the risks of the law as well as the perils of the sea, until insurance becomes so costly that the best men will give it up, because it will be more profitable for prudent and honest merchants to stand their own insurers.

The practical result of this should be, that contracts of insurance are to be construed accurately, and neither liberally nor severely, and without favor to either party. And this view seems now to prevail to some extent in the courts.[1]

[1] In Hood *v.* Manhattan Fire Ins. Co., 1 Kern. 532, *Parker*, J., remarked: "Although it is said that policies of insurance are to be construed liberally for the insured, yet where the words are not ambiguous, and the expression of the intent of the parties is full, I know of no reason why they should be excepted from the general rules of law applicable to the construction of all contracts." And Lord *Ellenborough*, in Robertson *v.* French, 4 East, 130, 135, is still more explicit. He says: "In the course of the argument it seems to have been assumed, that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable to the terms of other instruments, and in all other cases; it is, therefore, proper to state, upon this head, that the same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, namely, that it is to be construed according to its sense and meaning, as collected in the first place from the terms used

It is a common rule in the interpretation of contracts that *and* may be read in the place of *or*, and *or* for *and*. In the same way if the intention of the parties requires it, the words "or either of them" may be added.[1]

The universal rule of common sense and common law, that evidence from without may be used to explain a written contract but not to vary it, is fully applicable to policies of insurance. This simple rule is as intelligible in itself as it is reasonable. But it has been much cumbered and darkened by Lord *Bacon's* ingenuities about patent and latent ambiguities, and has thus given rise to many difficult questions. It is, however, as we think, returning in the jurisprudence both of England and of this country to its original simplicity and accuracy.

Things said or written by either party or by both, while arranging for the policy, form no part of it, unless specifically referred to in the policy.[2] But the representations and promises

in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense." See also, Aguilar *v.* Rodgers, 7 T. R. 421; Mumford *v.* Hallett, 1 Johns. 433; Graves *v.* Boston Marine Ins. Co., 2 Cranch, 419; Honnick *v.* Phœnix Ins. Co., 22 Mo. 82.

[1] Davis *v.* Boardman, 12 Mass. 80. The owner of the ship and cargo in this case had given orders to have them insured in England, but fearing that his letter might not have arrived, he caused insurance to be effected in this country by a policy containing the following memorandum: "Should this vessel and cargo be insured in England, in time to attach, this policy is to be cancelled." The vessel was insured in England, but not the cargo. The court held, that the insurer on the cargo here was liable, and the clause was construed to mean, "Should this vessel and cargo, or either of them, be insured in England," etc.

[2] In Higginson *v.* Dall, 13 Mass. 96, it was held that a written memorandum, which was delivered to the insurance broker by the agent of the insured, but not inserted in the policy or annexed to it, was not admissible in evidence. *Parker*, C. J., in delivering the opinion of the court, said: "Although policies of insurance are not technically specialties, not being under seal, they have, nevertheless, ever been deemed instruments of a solemn nature, and subject to most of the rules of evidence which govern in the case of specialties. The policy itself is considered to be the contract between the parties; and whatever proposals are made, or conversations had, between the parties prior to the subscription, they are to be considered as waived, if not inserted in the policy, or contained in a memorandum annexed to it." See also, Weston *v.* Emes, 1 Taunt. 115; New York Ins. Co. *v.* Thomas, 3 Johns. Cas. 1; Mumford *v.* Hallett, 1 Johns. 433; Cheriot *v.* Barker, 2 id. 346; Vandervoort *v.* Smith, 2 Caines, 155; Ewer *v.* Washington Ins. Co., 16 Pick. 502; Whitney *v.* Haven, 13 Mass. 172;

made by the insured are of importance, and will be considered hereafter.

The subsequent admissions or statements of the parties cannot be offered in evidence to vary the written contract.[1] And the stipulations implied by the legal constructions of the expressions of the policy are equally parts of it, as if specifically written.[2]

And that which is written, whether upon the face, or at the side,[3] or on the back,[4] if referred to in the body of the instrument, or signed by the party upon whom it imposes an obliga-

New York Gas Light Co. *v.* Mechanics' Fire Ins. Co., 2 Hall, 108; Hogan *v.* Delaware Ins. Co., 1 Wash. C. C. 419; Halhead *v.* Young, 6 Ellis & B. 312, 36 Eng. L. & Eq. 109. The slip, or application for insurance, is not admissible to aid in the construction of the policy, except in the case of a latent ambiguity, or misrepresentation. Dow *v.* Whetten, 8 Wend. 160. But see contra, Norris *v.* Ins. Co. of North America, 3 Yeates, 84. In Urquhart *v.* Barnard, 1 Taunt. 450, an action was brought on a policy on goods, the vessel having liberty to touch at a place. A letter was shown to the underwriters at the time of effecting the insurance, in which it was stated that the vessel would touch at the port mentioned for the purpose of taking in salt. Lord *Mansfield*, C. J., held that the letter was admissible, on the ground that if a custom had been shown to stop at the port for the purpose of taking in salt, there would have been no deviation, because if the underwriters knew of the custom the insured were entitled to it. And that if the underwriters knew that the insured intended to stop there, it was the same as if they had notice by the general usage of trade. He said: "The letter is not made use of to vary or contradict the policy; it only shows that the underwriters knew the purpose of going there; it therefore shows, that there was no deviation from the course of the voyage intended and insured." We think, however, that this case cannot be supported. The doctrine, that if the assured tells the underwriter that he means to go to a place and then a policy is made out to a different place, that he can go to the place he spoke of, is absurd on its face, and is not strengthened by comparing it to the knowledge of a usage. For if there is a usage, the assured has a right to avail himself of it. But if there is not, he certainly cannot make one by declaring to the underwriter that it exists. See Astor *v.* Union Ins. Co., 7 Cow. 202.

[1] See Paine *v.* M'Intier, 1 Mass. 69; Leland *v.* Stone, 10 Mass. 459.

[2] Potter *v.* Ontario & Livingston Mut. Ins. Co., 5 Hill, 147, per *Bronson*, J.

[3] Dennis *v.* Ludlow, 2 Caines, 111; Bean *v.* Stupart, 1 Doug. 11; Kenyon *v.* Berthon, id. 12, n. 4; De Hahn *v.* Hartley, 1 T. R. 343; Guerlain *v.* Col. Ins. Co., 7 Johns. 527; Fowler *v.* Ætna F. Ins. Co., 6 Cow. 673, 7 Wend. 270; Ewer *v.* Washington Ins. Co., 16 Pick. 502. See also, Cochran *v.* Retberg, 3 Esp. 121.

[4] Warwick *v.* Scott, 4 Camp. 62; Harris *v.* Eagle Fire Ins. Co., 5 Johns. 368. In this case the value of the goods was on the back of the policy, but it was referred to in the body of the instrument. In Stocking *v.* Fairchild, 5 Pick. 181, a paper was offered in evidence, on one side of which was a deed apparently absolute, dated and duly executed, and on the other a writing in the usual form of a condition to a mortgage without date, signature, or seal. Held, that both should be taken together. See also, Emerson *v.* Murray, 4 N. H. 171.

tion, is equally a part of the policy; and so it is if it be a separate document distinctly referred to;[1] or if it be on the same sheet as the policy when delivered, although not referred to.[2] But it seems that a paper is not a part of the policy so as to constitute a warranty if it is merely fastened to it by a wafer and not referred to.[3] And *a fortiori* it does not constitute part of the policy if merely folded up with it, when the policy is brought to the underwriters to be signed.[4] If the facts contained in a document referred to are not material to the contract or the risk, the reference does not amount to a warranty of them.[5] Among the rules which assist in the construction of this contract, as of others, that which seeks to ascertain and carry into effect the intention of the parties is of great importance. It must be understood, however, that it is only their intention as expressed by themselves which can thus be carried out. That is, their intention shall be enforced if their words can be made by any reasonable intendment to embrace it. But if they meant one thing and said another, the law cannot help them.[6]

[1] Routledge *v.* Burrell, 1 H. Bl. 254; Wood *v.* Worsley, 2 id. 574; Worsley *v.* Wood, 6 T. R. 710; Tarleton *v.* Staniforth, 5 T. R. 695, 1 B. & P. 471. The application for insurance, if referred to, forms part of the policy. Clark *v.* Manuf. Ins. Co., 8 How. 235; Murdock *v.* Chenango Co. Mut. Ins. Co., 2 Comst. 210; Jennings *v.* Chenango Co. Mut. Ins. Co., 2 Denio, 75; Burritt *v.* Saratoga Co. Mut. F. Ins. Co., 5 Hill, 188; Trench *v.* Chenango Co. Mut. Ins. Co., 7 Hill, 122; Kennedy *v.* St. Lawrence Co. Mut. Ins. Co., 10 Barb. 285; Kentucky & Louisville Mut. Ins. Co. *v.* Southard, 8 B. Mon. 634; Brown *v.* Peoples' Mut. Ins. Co., 11 Cush. 280. But see Williams *v.* New England Mut. F. Ins. Co., 31 Maine, 219. The application is often expressly made part of the policy. Allen *v.* Charlestown Mut. F. Ins. Co., 5 Gray, 384.

[2] Murdock *v.* Chenango Co. Mut. Ins. Co., 2 Comst. 210; Roberts *v.* Chenango Co. Mut. Ins. Co., 3 Hill, 501. In each of these cases the policy was on one half of an entire sheet, and on the other half there was a printed statement, headed "Conditions of Insurance." No reference was made to it in the body of the policy. Held, that it formed part of it. In Duncan *v.* Sun F. Ins. Co., 6 Wend. 488, the paper was both annexed and referred to in the policy.

[3] Bize *v.* Fletcher, 1 Doug. 13, n.

[4] Pawson *v.* Barnevelt, 1 Doug. 13, n.

[5] Jefferson Ins. Co. *v.* Cotheal, 7 Wend. 72; Snyder *v.* Farmers' Ins. & Loan Co., 13 Wend. 92, 16 id. 481; Stebbins *v.* Globe Ins. Co., 2 Hall, 632. But if the policy contains the following clause, "Reference being had to the application, etc., for a more particular description, and as forming part of this policy," this is a warranty of the facts contained in the application. Burritt *v.* Saratoga Co. Mut. F. Ins. Co., 5 Hill, 188; Kennedy *v.* St. Lawrence Co. Mut. Ins. Co., 10 Barb. 285. But see, *contra*, Kentucky & Louisville Mut. Ins. Co. *v.* Southard, 8 B. Mon. 634.

[6] See cases ante, p. 50, n. 2; 2 Parsons on Contracts, 7. In Mackie *v.* Pleasants, 2

Sometimes it is useful to resort to the general principle and purpose of insurance, namely, that of giving indemnity against actual loss and no more, and apply this to the construction of doubtful phrases.[1]

In the same way it is often well to remember the especial subject-matter of the contract under consideration; for this may afford material assistance in its interpretation. And often some parts of the policy will explain other parts; for, if it be possible, that meaning shall be adopted which gives significance and validity to the whole instrument. It is however often said that written words control the printed part of the policy, because printed forms are made for cases generally, but seldom for any especial case, and that the written words determine the intention of the parties as to the meaning of the policy.[2] This is true to a great extent, but the general rule must be that if the whole can be construed together, so that the written words and those printed make an intelligible contract, this construction is to be adopted.[3] The reason of this rule is obvious, because the inten-

Binn. 363, 373, the rule is stated as follows by *Yeates*, J.: "The intention of the parties, and not the literal meaning of the words, is to be attended to in the construction of policies. Their intention is, if possible, in the first instance, to be collected intrinsically from all the expressions contained in the written instrument; but where that is silent as to the object of research, it may be fairly inferred from extrinsic circumstances, the perils intended to be guarded against, and the relative state of the vessel at the time."

[1] See Nelson *v.* Suffolk Ins. Co., 8 Cush. 477, 490.

[2] Lord *Ellenborough*, in Robertson *v.* French, 4 East, 130, 136, stated the law as follows: "The only difference between policies of assurance, and other instruments in this respect, is that the greater part of the printed language of them being invariable and uniform, has acquired from use and practice a known and definite meaning, and that the words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied) are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case, and that of all other contracting parties upon similar occasions and subjects." See also, Coster *v.* Phoenix Ins. Co., 2 Wash. C. C. 51.

[3] Wallace *v.* Ins. Co., 4 La. 289; Cushman *v.* North Western Ins. Co., 34 Maine, 487; Alsager *v.* St. Katherine's Dock Co., 14 M. & W. 794, 799; Howland *v.* Comm. Ins. Co., Anthon, N. P. 26. In Goicoechea *v.* La. State Ins. Co., 18 Mart. La. 51, 55, *Porter*, J., said: "The rule invoked by this argument, that the written parts of the policy should control those that are printed, is correct,

tion of the parties is presumed to be "alive and active throughout the whole instrument, and that no averments are anywhere inserted without meaning and without use." [1]

The law of place sometimes comes into consideration; and the general rule here is, that every contract is considered to be made in accordance with the laws of the place where it is made, and to be subject to their interpretation.[2] If, however, the contract is made in one place, but is to be executed or to take effect in another, the general presumption of the law is, that the parties intended it to be governed and to be interpreted by the law of this latter place.[3]

If a letter proposing insurance be written in one place to another in which the insurance is to be effected, the Supreme Court of the United States have held that the letter is to be construed by the usage of the place where it is written,[4] overruling Mr. Justice Story's decision that it should be read as it would be understood in the place to which it was written, and in which insurance was requested.[5] We cannot but think that

because the written words are the immediate language and terms stated by the parties themselves for the expression of their meaning, and the printed ones a general formula made for all cases that may be presented. But the rule cannot properly receive an application in cases other than those where the written and printed words so contradict each other, that the one must yield to the other." In Hunter *v.* General Mutual Ins. Co. of N. Y., 11 La. Ann. 139, a number of slaves were insured, by a written clause "solely against loss by drowning in consequence of the stranding or shipwreck of the vessel, the assurers being warranted against all other risks." There was a printed clause in the policy authorizing the recovery of a general average contribution. It was held that the two clauses would stand together, because "a liability for a general average contribution cannot properly be called a risk; it is an obligation incident to a sacrifice made to avert a risk. It is based upon the equitable rule that no one should enrich himself at another's expense; but it is not itself a risk, according to any proper interpretation of that term."

[1] Goix *v.* Low, 1 Johns. Cas. 341.

[2] In Hyde *v.* Goodnow, 3 Comst. 266, an insurance company in New York had an agent in Ohio authorized to receive applications for insurance, but not to complete the contract. It was held under these circumstances that a policy issued by the company in New York to a person in Ohio, was to be governed by the laws of New York, and that a law of Ohio declaring all policies signed, issued, or delivered in the State by a company not chartered by a law of the State, or by a licensed agent, did not apply.

[3] See 2 Parsons on Contracts, 95.

[4] Hazard *v.* N. Eng. Mar. Ins. Co., 8 Pet. 557.

[5] Hazard *v.* N. Eng. Mar. Ins. Co., 1 Sumner, 218. The question in this case was as to the meaning of the term "coppered vessel." The Supreme Court held it was to be construed according to its meaning at the place where the ship belonged and the

the overruled opinion was the better one. In the case in question the letter was written in New York and sent to Boston. But the principle, if a good one, will apply anywhere; and if a merchant in Mauritius writes to Boston proposing insurance, and uses phrases in his letter which have a definite and reasonable and well-established meaning in Boston, and insurance is there effected, can it be right that the duties or obligations of the insurers are to be measured by the very different meaning those words may have at Mauritius?

Every written contract is presumed to have been written and delivered at its date; this word being only a shortened form of "datum," and meaning that the contract was then given. But this presumption may be overcome by evidence, and the contract will then take effect from its actual making and delivery.[1]

In the construction of these words, it may be asked, at whose instance were they introduced? The rule, that every instrument shall be construed strongly against him who gives it, is of no great use generally,[2] and has little or no application to contracts of insurance. But there are good reasons for saying, that where either party proposes and inserts especial phrases or provisions, and these are found to be ambiguous, and they must be construed either for or against the proposer, he must be satisfied with the construction which is unfavorable to him, because it is

owner lived. Mr. Justice *Story* had previously decided, in Tidmarsh *v.* Washington F. & M. Ins. Co., 4 Mason, 439, 442, that if there was any difference in respect to the standard of seaworthiness at the place where the vessel belonged, and that at which the insurance was effected, the former should be taken, on the ground that underwriters were presumed to know what constituted seaworthiness at a foreign port, and the Supreme Court were of the opinion that the same rule should apply to a representation.

[1] Earl *v.* Shaw, 1 Johns. Cas. 313; Jackson *v.* Schoonmaker, 2 Johns. 230, 234. See Stone *v.* Bale, 3 Lev. 348; Hall *v.* Cazenove, 4 East, 477; United States *v.* Le Baron, 19 How. 73.

[2] "It is to be noted," saith Lord *Bacon*, "that this rule is the last to be resorted to, and is never to be relied upon but where all other rules of exposition of words fail; and if any other come in place, this giveth place. And that is a point worthy to be observed generally in the rules of the law, that when they encounter and cross one another in any case, it be understood which the law holdeth worthier, and to be preferred, and it is in this particular very notable to consider, that this being a rule of some strictness and rigor, doth not as it were its office, but in absence of other rules which are of more equity and humanity." Bacon's Max. Reg. 3. See also, Love *v.* Pares, 13 East, 80; Doe *v.* Dodd, 5 B. & Ad. 689; Adams *v.* Warner, 23 Vt. 411.

his own fault that the words he used did not express his purpose and intention more plainly.[1]

B. *Of Usage.*

While the general rules and principles of construction which apply to other contracts apply also to contracts of insurance, it is obvious that there are none other which call so often and so forcibly as these upon usage for their interpretation. The policy itself is not a well-drawn legal instrument. It is, to the last degree ill-drawn; and except for the aid of ages of adjudication, and of practice under it, it would be impossible to determine with any accuracy what rights it conferred or what obligations it imposed.[2]

Moreover, most policies contain phrases made necessary by the peculiar circumstances of each case, or introduced for the especial purposes of the parties. These phrases are, for the most part, mercantile phrases. They are used by merchants among themselves, and understood by them; and much injustice would be done if the law did not interpret them in the way in which they are used and understood. But this can be learnt only from the usage of merchants.[3]

There are, however, some rules in reference to usage, and interpretation by usage, which it is important to remember.

The usage must be reasonable in itself,[4] and conformable to law.[5] This is at once obvious and certain.

[1] Blackett *v.* Royal Exch. Ass. Co., 2 Cromp. & J. 244, 251, 2 Tyrw. 266; Audley *v.* Duff, 2 B. & P. 111; Donnell *v.* Columbian Ins. Co., 2 Sumner, 366, 381; Palmer *v.* Warren Ins. Co., 1 Story, 360, 364; Louisville Mar. & F. Ins. Co. *v.* Bland, 9 Dana, 143, 151; Ætna Ins. Co. *v.* Jackson, 16 B. Mon. 242.

[2] See ante, p. 27, n. 1.

[3] In one of the earliest cases on this subject, the court held that the clause, "warranted to depart with convoy," must be construed according to the usage among merchants, *i. e.* from such place where convoys are to be had. Lethulier's Case, 2 Salk. 443. See also, Mobile Mar. Dock & M. Ins. Co. *v.* McMillan, 27 Ala. 77.

[4] Macy *v.* Whaling Ins. Co., 9 Met. 354, 363, per *Hubbard*, J.; Ougier *v.* Jennings, cited 1 Camp. 505; Barney *v.* Coffin, 3 Pick. 115.

[5] Thus a usage for a master to sell a cargo without necessity is invalid on the ground of illegality. Bryant *v.* Commonwealth Ins. Co., 6 Pick. 131. So, it is illegal for the owner to purchase it when sold by the master through necessity, and a usage justi-

It must be definite, for if obscure itself, it cannot make another obscure thing plain; reasonably well-established, or it cannot be supposed to have a binding force upon the parties; and distinctly brought home to the knowledge of the parties, either by its universal acceptance or by special evidence, for there is no reason why it should be permitted to affect those who did not know it.[1] Indeed it has been said that "the true test of a commercial usage is its having existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made in reference to it.[2]

But it may be, in some measure local and limited, provided it be general enough to embrace the parties, the contract, and the particular adventure or subject-matter of the contract. For a local usage cannot affect parties out of that locality, unless they

fying such a proceeding is invalid. Robertson *v.* Western Fire & M. Ins. Co., 19 La. 227. In Hone *v.* Mutual Safety Ins. Co., 1 Sandf. 137, affirmed Mutual Safety Ins. Co. *v.* Hone, 2 Comst. 235, *Sandford*, J., said: "We find it clearly settled that a general usage, the effect of which is to control rules of law, is inadmissible. So, of one which contradicts a settled rule of commercial law." It was accordingly held, that a usage that a reinsurer should pay to the first insurer only so much of the sum reinsured, as bore the same proportion to the property destroyed, which was covered by the first insurance, as the whole reinsurance bore to the original insurance, was inadmissible. And if the policy does not contain words which would, by construction of law, cover the interest of the assured, a usage to show that the words used are considered as equivalent to "for account of whom it may concern," or words of similar import, is not admissible. Turner *v.* Burrows, 5 Wend. 541, 8 id. 144; Wise *v.* St. Louis Mar. Ins. Co., 23 Mo. 80.

[1] In M'Gregor *v.* Ins. Co. of Penn., 1 Wash. C. C. 39, the court said: "Customs acquire the force of law, because, as they must be ancient, uniform, and reasonable, they must have been generally received, known, and approved." It was held, in this case, that notice of a custom must be given, or the evidence must be such that the jury might presume the party knew it. And in Bentaloe *v.* Pratt, Wallace, 58, 64, it was said "that a usage ought to be clearly made out; its existence, its extent, and its notoriety should be indisputable."

[2] Smith *v.* Wright, 1 Caines, 43, 45. See also, Trott *v.* Wood, 1 Gallis. 443. But the length of time is not a matter of so much importance as the question, whether during the time the usage has been uniform. Thus, in Noble *v.* Kennoway, 2 Doug. 510, the trade had existed to the place in question but three years, yet it was held that the way in which it was carried on might be shown for the purpose of establishing a usage. And Lord *Mansfield* said: "It is no matter if the usage has only been for a year." It is not, however, sufficient to constitute a usage, that there are some instances of a thing being done in a particular trade. Salisbury *v.* Townson, Millar, Ins. 418; Tennant *v.* Henderson, 1 Dow, P. C. 324; Martin *v.* Del. Ins. Co., 2 Wash. C. C. 254.

are shown to have known it, and to have entered into the contract with that knowledge.[1]

No usage is permitted to contradict the plain and positive provisions of the policy.[2] In some cases it seems to be held,

[1] In Rogers *v.* Mechanics' Ins. Co., 1 Story, 603, insurance was effected in New Bedford on a ship from Bristol, Rhode Island, on a whaling voyage. It was held that evidence of the usage of the whaling trade at New Bedford, was not admissible. Mr. Justice *Story* said: "The usage or custom of a particular port, in a particular trade, is not such a custom as the law contemplates to limit or control, or qualify the language of contracts of insurance. It must be some known general usage or custom in the trade, applicable and applied to all the ports of the State, where it exists; and from its character and extent so notorious, that all such contracts of insurance in that trade must be presumed to be entered into by the parties, with reference to it, as a part of the policy. If the usage or custom be not so notorious; if it be partial, or local in its existence or adoption; if it be a mere matter of private and personal opinion of a few persons engaged therein; it would be most dangerous to allow it to control the solemn contracts of parties, who are not or cannot be, presumed to know it, or adopt it, as a rule to govern their own rights or interests." In Natchez Ins. Co. *v.* Stanton, 2 Smedes & M. 340, it was held, that the usages of insurance offices at New Orleans, could not affect insurance offices at Natchez. And in Child *v.* Sun Mutual Ins. Co., 3 Sandf. 26, where a Rhode Island ship was insured in New York, evidence of the usage in New Bedford was held to be inadmissible. And in Mason *v.* Franklin Fire Ins. Co., 12 Gill & J. 468, where the question arose as to the construction of a policy on a vessel building in Baltimore, it was held that the usage in New York under similar circumstances could not be admitted in evidence. But see Noble *v.* Kennoway, 2 Doug. 510, where usage of the Newfoundland trade was admitted as aiding in proving a usage of the Labrador trade. In Macy *v.* Whaling Ins. Co., 9 Met. 354, the vessel was owned in Nantucket and was insured in Boston and New Bedford. The question arose respecting a certain usage which was well established in New Bedford, and the court said: "The inquiry will be whether the usage is general to all who are concerned in the trade, or whether it is a local usage, and confined to the ports of the Commonwealth; and if local, whether the merchants and underwriters in Nantucket and Boston are conversant with it, and practice upon it. But if the custom is limited to the port of New Bedford, or is not well known or established in Nantucket and Boston, then it cannot be admitted to affect the construction of the defendants' policy, or to lessen the amount of their contributory share of the loss." In Cobb *v.* New England Mutual M. Ins. Co., 6 Gray, 192, 200, insurance was effected in Boston on a vessel in Maine, at and from Perry, to stop at Eastport and at and thence to a southern port. The court said: "The contract is presumed to be made with reference to the usages of the place to which the contract has reference; in this case that it was usual to take vessels built at Perry to Eastport to be rigged and equipped for sea."

The question has arisen how far the usages of insurance companies or associations are binding upon persons doing business with them. The general rule of law must be, that if the person is in the habit of transacting business there, so that he may be presumed to have knowledge of the usage and to contract in reference to it, he is bound by it, but otherwise, not. Gabay *v.* Lloyd, 3 B. & C. 793; Bartlett *v.* Pentland, 10 B. & C. 760; Scott *v.* Ewing, 1 B. & Ad. 605.

[2] Thus in M'Gregor *v.* Ins. Co. of Penn., 1 Wash. C. C. 39, a usage to strike off

that not only must a usage be shown, but the further fact must be proved that the underwriters have assented to the usage by paying claims arising under it.[1]

one third of the gross freight for charges, and to pay two thirds to the assured in a policy on freight, was held to be invalid. See also, Hone *v.* Mutual Safety Ins. Co., 1 Sandf. 137, 2 Comst. 235, cited ante, p. 56, n. 5. So a usage not to pay for a particular part of the vessel's apparel or furniture, as a boat when it is in a certain place on the vessel, is invalid if the place is that where it is usually carried. Blackett *v.* Royal Exch. Ass. Co., 2 Cromp. & J. 244, 2 Tyrw. 266. Lord *Lyndhurst*, C. B., in this case said: "Usage may be admissible to explain what is doubtful; it is never admissible to contradict what is plain." In Mercantile Mut. Ins. Co. *v.* State Mut. F. & M. Ins. Co. of Penn., 25 Barb. 319, the question arose as to the construction of the following order for reinsurance: "Reinsurance is wanted by the Mercantile Mut. Ins. Co. for $—— on cargo on board of the ship Great Republic at and from New York to Liverpool on the excess of risks the applicants may have over $50,000, not to exceed $15,000." At the time of the loss the plaintiffs had insured less than $50,000 on the cargo of the ship, but they had risks on the freight and on the ship, which, when added to the amount on the cargo, amounted to over $65,000. It was held, that the defendants only engaged to insure the excess of risks on the cargo, and that evidence of a custom of the parties and of the port of New York in adjusting contracts of reinsurance, upon such applications, to regard the word "excess" in the application, as applicable to the whole amount of insurance at risk in or upon the vessel, and that the premiums upon open policies had previously been adjusted and paid between the present parties upon that principle, was properly excluded, there being no ambiguity on the face of the instrument. In Rankin *v.* Am. Ins. Co. of N. Y., 1 Hall, 619, the defendants offered to prove "that by the established usage of trade in the port of New York and in other ports, the master of the vessel is in all cases responsible for any damage sustained by the goods delivered by him to the owner or consignee, unless there has been an actual survey made on board the vessel by the wardens of the port or other officers, and on such survey the surveyors shall have found that the goods were properly stowed, and were damaged on the voyage by the perils of the seas. That by a similar usage as between the assurers and the assured, the survey so made by the wardens, is a document indispensable to be produced in order to charge the underwriters, and that the preliminary proof is deemed insufficient unless such document be exhibited as a part of it." *Oakley*, C. J., said: "By the terms of the policy in the present case the defendants bound themselves to pay all damage to the property insured, arising from the perils of the sea; and the attempt now made is to introduce into the policy a condition that they shall not be responsible unless such damage is ascertained in a particular mode, and that too by the aid of third persons, over whom the assured has no control. Such a condition would, in my judgment, vary the legal obligations of the defendants as ascertained by the plain language of the policy." See also, Bentaloe *v.* Pratt, Wallace, 58, 64. In Illinois Mut. Fire Ins. Co. *v.* O'Neile, 13 Ill. 89, it was held that if the charter of an insurance company declared the contract to be void in case of additional insurance on a house unless it was made with the consent of the company, evidence of usage that this applied to goods was not admissible.

[1] See Taunton Copper Co. *v.* Merchants' Ins. Co., 22 Pick. 108. In Hermann *v.* Western M. & F. Ins. Co., 13 La. 516, it was held that although it might be usual for steamboats to tow vessels up and down the river, yet that this could have no effect upon

Foreign, unusual, and technical words, are especially those which are often interpreted by usage, and by that only.[1] For common words are to be understood in a common way; and words of single and plain meaning interpret themselves, and usage is seldom permitted to cast a doubt upon their meaning. There are, however, cases in which words that have a plain meaning of their own, and have this meaning fortified by settled adjudication, are yet entirely changed in their force and effect by evidence of usage, where this leaves no doubt of the meaning and intention of the parties.[2]

With the precautions above stated, we know not why evidence of usage should not be freely admitted, and regarded as very useful. But eminent judges have even doubted whether any

the insurers, there being no evidence of a usage for them to pay in such a case. The case of Taunton Copper Co. *v.* Merchants' Ins. Co., *supra*, related to the liability of insurers when goods were carried on deck according to the usage of the trade. This question we shall consider hereafter.

[1] In Hone *v.* Mutual Safety Ins. Co., 1 Sandf. 137, 2 Comst. 235, *Sandford*, J., said: "There is a great variety of cases, in which the courts have permitted evidence to be given to show the meaning of terms in commerce and the arts, or of words and phrases peculiar to mercantile pursuits. This is generally spoken of as proof of usage; although in many cases it is rather the definition of technical language."

[2] In Sleght *v.* Rhinelander, 1 Johns. 192, it was held that the term "sea letter" could not be explained by parol to mean merely a certificate of ownership, as the nature of the instrument was settled by public treaties and acts of congress. But this decision was reversed on appeal, 2 Johns. 531. In Child *v.* Sun Mutual Ins. Co., 3 Sandf. 26, it was held that usage was admissible to prove that a whaling voyage included the taking of sea elephants on the beaches and islands of coasts, as well as wherever whales were to be found. It was also held to be a question for the jury to decide whether the mating of two whaling vessels was a deviation. Evidence of usage as to the meaning of the word "roots" has been admitted. Coit *v.* Commercial Ins. Co., 7 Johns. 385. So, in regard to "corn." Scott *v.* Bourdillion, 5 B. & P. 213. And "furs." Astor *v.* Union Ins. Co., 7 Cow. 202. Cotton in bales has been held to mean "pressed" bales. Taylor *v.* Briggs, 2 Car. & P. 525. "Outfits" on a whaling voyage, to include one quarter of the catchings. Macy *v.* Whaling Ins. Co., 9 Met. 354. "Furniture," to comprehend provisions. Brough *v.* Whitmore, 4 T. R. 206. "Proceeds" of a cargo, the cargo itself if brought back. Dow *v.* Whetten, 8 Wend. 160. Commercial rather than geographical divisions of countries are regarded. Thus Mauritius, which is geographically an African island, is considered commercially as an Indian one. Robertson *v.* Clark, 1 Bing. 445. See also, Uhde *v.* Walters, 3 Camp. 16. So usage may determine the commercial limits of an island or port to be different from its geographical limits. See Moxon *v.* Atkins, 3 Camp. 200; Constable *v.* Noble, 2 Taunt. 403; De Longuemere *v.* N. Y. Fire Ins. Co., 10 Johns. 120; Cockey *v.* Atkinson, 2 B. & Ald. 460. See also, post, chapter on Deviation and a Usage to Deviate, and chapter on the Termination of the Risk as governed by Usage.

usage, not expressly referred to by the parties, should be regarded by the court. No tribunal would go so far as this now. And even Mr. Justice *Story's* rule, that such testimony should be received "with cautious reluctance, and watched with scrupulous jealousy,"[2] would, in our judgment, be better expressed if he had only said it should be admitted and applied *cautiously*.

[1] Rogers *v.* Mechanics' Ins. Co., 1 Story, 603.

CHAPTER II.

OF THE INTEREST OF THE INSURED.

SECTION I.

OF THE NECESSITY OF SOME INTEREST.

THE insured must have an interest in the subject of insurance, and this interest must be at risk. And as insurance is essentially a contract of indemnity — which principle is of great importance and wide application — the insurers can be called upon only to make good a loss sustained. This loss, whether total or partial, must be measured by the value of the property insured; and this value may either be determined by proper evidence after the loss has occurred and the claim been made, or it may be agreed upon by the parties at the time the policy is made, and be expressed therein.

SECTION II.

OF OPEN POLICIES AND VALUED POLICIES.

If a policy does not state the agreed value of the property insured, but leaves that for proof, it is called an OPEN POLICY;[1] but if the policy states what the parties have agreed upon as the

[1] That is also called an open policy where the property insured is to be inserted by subsequent indorsements. See *supra*, p. 34, n. 3.

value of the property, it is called a VALUED POLICY; and, in general, this agreed estimate and valuation, is final and conclusive upon both parties;[1] subject however to certain rules and principles. One of these is, that, as there must not be a wager policy, or an insurance without interest, so there must not be such a valuation of property as is wholly unreal, and is plainly a mere cover for a wager policy.[2] But, as it is certain that all commercial property has a fluctuating value, which may rise greatly, and is generally purchased or held in expectation of a rise, there may be a valuation by the holder which might seem excessive to others, and yet be honest on his part. And the courts have gone very far in this direction; almost to the extent of saying that if the insured have any property actually at risk, of the kind indicated, and of a real and substantial value, no mere exaggeration of this value in the policy shall avoid it.[3]

The valuation is void if intended to cover an illegal interest or

[1] In Hodgson *v.* Mar. Ins. Co. of Alexandria, 5 Cranch, 100, 6 Cranch, 206, the ship was valued at $10,000, and insured for $8,000. The court held that it would not necessarily avoid the contract, nor restrict damages to that sum, if it were proved that the actual value of the vessel was no more than $3,000, because she might have fairly cost her owners the whole amount of her valuation. See also, Miner *v.* Tagert, 3 Binn. 204; Haven *v.* Gray, 12 Mass. 71, 75; Coolidge *v.* Gloucester Mar. Ins. Co., 15 Mass. 341; Davy *v.* Hallett, 3 Caines, 16; Kane *v.* Commercial Ins. Co., 8 Johns. 229; Whitney *v.* American Ins. Co., 3 Cow. 210; Brooke *v.* La. State Ins. Co., 16 Mart. La. 640, 681; Akin *v.* Mississippi Mar. & F. Ins. Co., 16 Mart. La. 661; Feise *v.* Aguilar, 3 Taunt. 506. But see the remarks of Lord *Mansfield* in Hamilton *v.* Mendes, 2 Burr. 1198, 1213; Protection Ins. Co. *v.* Hall, 15 B. Mon. 411.

[2] Per Lord *Mansfield*, C. J., Lewis *v.* Rucker, 2 Burr. 1167, 1171; Mac Nair *v.* Coulter, 4 Brown, P. C. 450; Clark *v.* Ocean Ins. Co., 16 Pick. 289, 295; Wolcott *v.* Eagle Ins. Co., 4 Pick. 429, 438. In Catron *v.* Tennessee Ins. Co., 6 Humph. 176, 185, the court said: "We have no doubt from the proof that the property was grossly overvalued, having been estimated at some four thousand dollars more than it was really worth. This of itself would avoid the policy; for though it is true that slight overestimates, such as a man might in the valuation of his property honestly make, would not vitiate a policy, yet it is equally true that an overestimate such as shocks the sense, and shows that it could not have been made but by design, will. This, an overvaluation of one third, surely is."

[3] See cases *supra*. In Alsop *v.* Commercial Ins. Co., 1 Sumner, 451, 473, which was a case of insurance upon profits, Mr. Justice *Story* said: "I do not know that any overvaluation, however great, if it steers wide of a wager and a fraud, can be otherwise impeached." See also, Robinson *v.* Manuf. Ins. Co., 1 Met. 143; Gardner *v.* Col. Ins. Co., 2 Cranch, C. C. 550; Irving *v.* Manning, 1 H. L. Cas. 287, 304, 6 C. B. 391, 419, per *Patteson*, J.

peril;[1] or if it be made fraudulently in any respect. And in this case the fraud vitiates and avoids the whole contract, and the insured recovers nothing.[2] Though an overvaluation is not of itself necessarily proof of fraud, yet if gross and excessive, fraud may be inferred.[3]

A person may, in the same policy, value one thing insured, as the ship, and not another, as the freight or goods;[4] and he may insure the same thing, valued by one insurer and open by another; and a valuation in any one policy has no effect whatever in determining the value of the same thing in another policy.[5] And the authorities appear to lead to the conclusion, that

[1] See next section.

[2] Mr. Phillips states the rule thus: "If the goods have been fraudulently overvalued, the valuation is not binding. Where an overvaluation is fraudulently made, with the intention on the part of the assured of destroying the property, for the purpose of recovering of the insurers the amount at which it is valued, such a fraudulent purpose will make the whole contract void." 2 Phillips Ins. § 1182. The case of Haigh *v.* De La Cour, 3 Camp. 319, is cited in support of this proposition. But we think that the rule is well settled that a fraudulent overvaluation for any purpose will avoid the policy *in toto*, and not merely open the valuation. Gardner *v.* Col. Ins. Co., 2 Cranch, C. C. 550; Ocean Ins. Co. *v.* Fields, 2 Story, C. C. 59, 77; Hersey *v.* Merrimack Co. Mut. F. Ins. Co., 7 Foster, 149, 155; Protection Ins. Co. *v.* Hall, 15 B. Mon. 411, 429; Catron *v.* Tenn. Ins. Co., 6 Humph. 176, 185. There was in this latter case evidence of an intent to destroy the vessel, but the court considered that a fraudulent overvaluation of itself would be sufficient to annul the policy. The case of Haigh *v.* De La Cour, 3 Camp. 319, does not seem to us to warrant the distinction taken by Mr. Phillips. The insurance was on goods valued at £5,000. This valuation was obtained on false representations, by fictitious invoices, and by interpolated bills of lading, the value of the goods being only £1,400. The ship was afterwards run away with and carried to the West Indies, where the cargo was disposed of by a person whom the owners of the goods had put on board as supercargo. The action was brought by the assignees of the insured, they having become bankrupt, and it was contended that they had the right to recover the actual value of the goods on board; but Sir James *Mansfield*, C. J., said: "If the bankrupts intended from the beginning to cheat the underwriters, the assignees can recover nothing. The fraud entirely vitiates the contract." It does not appear that the owners had any thing to do with the running away of the ship, or that the act of the supercargo in selling the cargo was not, under the circumstances, for the best interest of all concerned. The case therefore seems a good authority in support of the proposition that a fraudulent overvaluation for any purpose avoids the policy.

[3] See cases cited in the preceding notes.

[4] Riley *v.* Hartford Ins. Co., 2 Conn. 368.

[5] Higginson *v.* Dall, 13 Mass. 96. In this case a vessel was insured in Boston by an open policy, and afterwards insured by a valued policy in Calcutta. A total loss having occurred, it was settled under the Boston policy without regard to the value expressed in the other. See also cases in next note.

if the valuation in the policy upon which the action is brought, is less than in the other, it is to be set aside. But if it be greater than in the other, it must be followed in estimating the loss. In our notes we shall endeavor to show the present position of this disputed question.[1]

[1] It is difficult, if not impossible to deduce from the adjudicated cases clear and well-defined rules to determine the effect of valuations, where there are prior insurances, or amounts have been paid upon other policies. In England a loss is paid proportionally by the different sets of underwriters, and not according to priority as in this country, and it would seem that in an action upon one policy a valuation in another policy is disregarded. In Bousfield *v.* Barnes, 4 Camp. 228, a vessel valued at £8,000 was insured for £6,000. By a subsequent policy the same vessel was insured for £600, being valued at £6,000. Upon the happening of a total loss, the sum insured by the first policy, £6,000, was paid to the assured. In an action upon the second policy, it was contended that the plaintiff was estopped to say to the underwriters upon this policy that the ship was worth more than £6,000, and that by receiving that sum from the previous underwriters, the plaintiff was fully indemnified. Lord *Ellenborough* said: "I think it is not enough for the underwriters on a particular policy to show that the assured has received from another quarter the amount of the valuation in that policy, unless this amounts in point of fact to a complete indemnity. In the present case the ship is proved to have been worth above £8,000. The plaintiff has received only £6,000 from the London Assurance. He has therefore an interest of £2,000 to which he may apply the policy on which the action is brought." The doctrine of this case was somewhat modified by the subsequent case of Irving *v.* Richardson, 1 Moody & R. 153, 2 B. & Ad. 193. In this case a vessel was valued at the same sum, namely, £3,000 in two different policies. Losses were paid by both insurance companies to an amount greater than the valuation, and an action was brought by one company to recover its proportion of the excess. The case went off on a ground other than that of the effect of the valuation, but it was distinguished from Bousfield *v.* Barnes, by Lord *Tenterden*, C. J., in that "there the sum mentioned as the value was different in the two insurances; here it was the same." He further said: "I am of opinion that where a person effects two insurances, declaring the same value in each, he is bound by that sum, and cannot receive beyond that extent." The case of Kenny *v.* Clarkson, 1 Johns. 385, goes still further than Bousfield *v.* Barnes, in setting aside a valuation. A vessel, worth $7,000, was insured, valued at $2,000. There were prior insurances to the amount of $5,000, and upon the happening of a loss, there was a recovery upon one policy to the amount of $3,000. Held that the assured might recover. In Watson *v.* Ins. Co. of North America, 3 Wash. C. C. 1, a vessel worth $15,000 was insured for $12,000, and valued at the same sum. It was held that a prior bottomry bond, which was substantially an insurance for the amount of the bond, should, in estimating the amount covered by the policy, be deducted from the real value and not from the agreed value. There are, however, cases in favor of upholding the valuation where there have been prior insurances. Thus in Murray *v.* Ins. Co. of North America, 2 Wash. C. C. 186, a vessel was insured in one policy for $4,000, and valued at that sum; and in a subsequent policy for $4,000, and valued at $6,000. In an action on the second policy, held that the defendants were liable for so much of the *agreed* value of the vessel as was not covered by the prior insurance, that

If the insured owns only a proportion of the property insured, as one fourth, one half, or the like, the valuation will, generally, be taken to be of that proportion.[1] But if only a part of the goods intended to be at risk and to be included in the valuation are put on board and at risk, the valuation applies to them, only *pro rata*.[2] And a valuation of an outward cargo may be held to

is, to the extent of $2,000. In Kane *v.* Commercial Ins. Co., 8 Johns. 229, insurance was made to the amount of $15,000 on "goat-skins *valued* at fifty cents each," and the policy contained the usual clause as to prior insurance. A prior insurance had been made by an *open* policy on the *cargo* on board the same ship, for the same plaintiffs, to the amount of $22,000. The prime cost of the skins was ten cents each. Estimating the skins at fifty cents each, and the rest of the cargo at the invoice prices, the amount was sufficient for both policies; but the cargo exclusive of the skins was not sufficient to absorb the prior insurance. In an action on the second policy, it was held that the whole of the goat-skins were to be valued at fifty cents each, and after deducting from this amount, the difference between the invoice price of the cargo and charges, exclusive of the goat-skins, and the $22,000 or amount of prior insurance, the residue would be the interest covered by the second policy; that it was immaterial whether the first policy was open or valued, if the skins, at fifty cents each, would furnish interest sufficient for both policies. *Thompson*, J., said: "The policy is not that as many of the goat-skins as remain uncovered by the former policy, at the invoice price, shall be covered by this policy at the valuation. This is not the sense and meaning of the contract. It is that the goat-skins laden on board shall be valued at fifty cents; and in determining how far the plaintiff's interest was covered by it, all the goat-skins on board are to be reckoned according to this valuation." See Minturn *v.* Columbian Ins. Co., 10 Johns. 75; Pleasants *v.* Maryland Ins. Co., 8 Cranch, 55. A different rule was laid down in M'Kim *v.* Phoenix Ins. Co., 2 Wash. C. C. 89. It was held in that case, that a valuation of coffee at twenty-two cents per pound, was to be applied only to that part of the coffee which was uncovered by a prior policy. It would seem, however, from the opinion of Mr. Justice *Washington*, that the second policy, in addition to the ordinary clause, making the insurers answerable for as much as the prior insurance was deficient towards covering the property, contained a clause making it null and void so far as property had been previously insured.

Where it is clear that the valuation applies to the whole thing insured, and not to the surplus after deducting the prior insurances, as was clearly intended in Kenny *v.* Clarkson, it is difficult to see upon what principles it can be set entirely aside.

[1] Feise *v.* Aguilar, 3 Taunt. 506. But this is a question of construction, and if it appear from the face of the instrument that the valuation applies to the whole property it will be so held. Dumas *v.* Jones, 4 Mass. 647; Mayo *v.* Maine Fire & M. Ins. Co., 12 Mass., 259; Murray *v.* Columbian Ins. Co., 11 Johns. 302. See also, Post *v.* Phoenix Ins. Co., 10 Johns. 79.

[2] "The valuation, in the case of goods, looks to all the goods intended to be loaded; and in case of freight, it looks to freight upon all the goods the ship is intended to carry upon the voyage insured. If, for instance, the insurance be generally upon goods, and the goods intended to be protected be five hundred hogsheads of sugar, and a valuation be made accordingly, but the ship by accident takes on board one hundred only, and sails, and is afterwards lost by one of the perils in-

be a valuation of a return or intermediate cargo substituted for the whole outward cargo by purchase.[1]

In general, a valuation of the whole subject-matter, will be held to be a valuation of the insured's whole interest in it, including the premium paid by him; but the contrary may be expressed or shown by the terms of the policy.[2]

sured against with those one hundred on board; can it be contended that the assured shall recover to the full amount of the valuation, that is, for the whole five hundred, when he has lost only one hundred?" Per Lord *Ellenborough*, C. J.; Forbes *v.* Aspinall, 13 East, 323. See Rickman *v.* Carstairs, 5 B. & Ad. 651; Haven *v.* Gray, 12 Mass. 71, 76, per *Parker*, C. J.; Wolcott *v.* Eagle Ins. Co., 4 Pick. 429; Clark *v.* Ocean Ins. Co., 16 Pick. 289, 295; Whitney *v.* American Ins. Co., 3 Cow. 210; Brooke *v.* La. State Ins. Co., 16 Mart. La. 640, 681.

[1] Haven *v.* Gray, 12 Mass. 71. In this case, an insurance was effected for $11,000, "upon one hundred bales of Louisiana cotton, valued at ninety-four dollars each, and twenty-five tons of logwood, valued at eighty dollars per ton," out and home. Held that the valuation would apply to a return cargo, provided and advanced by the consignees of the outward cargo, in consideration of the assignment and on the account and credit of the assured. Where, however, there was an insurance of $12,000 upon the cargo of a vessel out and home, and the policy contained a memorandum at the bottom, by which it was declared that the insurance was "on flour, dry goods, wine, and provisions, etc. etc., valued at $12,000," Mr. Justice *Washington* held, on the ground that the valuation should be restricted to the articles enumerated, that the outward cargo alone was valued. M'Kim *v.* Phoenix Ins. Co., 2 Wash. C. C. 89. This is in all cases a question of construction; of the intent and meaning of the parties as expressed upon the face of the policy. Very slight circumstances would show that a valuation should be confined to the outward cargo; as, for instance, that the valuation, as in M'Kim *v.* Phoenix Ins. Co., is contained in a memorandum apart from the policy. Where the insurance is effected upon the cargo of a vessel out and home, and the valuation is applied generally to such cargo, there is no difficulty in applying such valuation to a return cargo. Whitney *v.* American Ins. Co., 3 Cow. 210, affirmed on error 5 Cow. 712.

[2] Brooks *v.* Oriental Ins. Co., 7 Pick. 259. This was a case of a valued policy upon a ship, by which the insurer was not to be liable for a partial loss unless it should amount to five per cent. It was held, that the percentage should be reckoned upon the valuation after deducting the premium. In Mayo *v.* Maine Fire & Mar. Ins. Co., 12 Mass. 259, an insurance was effected for $9,000 on a ship, at a premium of forty-five per cent. The vessel was valued at $18,000, which was its real value. The assured owned only one third of the vessel. Held, that the premium was not included in the valuation, but should be added to the interest of the assured in determining the amount of his insurable interest under the policy. The assured recovered the whole amount insured. There seems to be no good reason for disputing the authority of this case. Where the subject is insured in gross, at a round sum, and the assured owns the entire subject or interest valued, there is, no doubt, a very strong presumption that the premium is included in the valuation. Such, in the absence of opposing indications, is the rule of law. Where, however, the assured owns only a part of the subject insured, the whole of which is valued, the presumption would seem to be the

Some of the early authorities were quite strong in restricting the valuation to a case of total loss, opening the policy in the adjustment of a partial loss;[1] nor is the contrary doctrine absolutely settled yet. Sometimes it might be difficult to apply the valuation in such a case, but weighty opinions and decisions, and the strongest reasons lead to the conclusion that a *bonâ fide* valuation should be applied, if possible, to the adjustment of partial losses.[2] In a future chapter we shall consider the question whether a valuation can be set aside in case of a technical total loss.[3]

other way. In Mayo *v.* Maine F. & Mar. Ins. Co., if the premium must be supposed to be included in the valuation at $18,000, it should, in order that justice may be done to the assured, be, not the premium upon the $9,000 insured, but the premium upon the entire insurable interest. Circumstances, clearly admissible in evidence, showed that this was not the case. Mr. Benecke says, p. 159, London. Ed., Benecke & Stevens, Phillips Ed. 54, that where the foreign coin in which the invoice value is expressed, is valued at so much in the coin of the place where the insurance is effected, the premium, in the absence of express stipulation, would be held to be included, "because fixing the value of the coin is in fact a valuation of the goods." This, however, is not quite correct. See Ogden *v.* Columbian Ins. Co., 10 Johns. 273. Where coffee insured was valued at twenty-five cents per pound, the loss was adjusted by adding the premium to the valuation. Minturn *v.* Columbian Ins. Co., 10 Johns. 75.

[1] In Shawe *v.* Felton, 2 East, 109, 113, the counsel, in arguing, cited the case of Le Cras *v.* Hughes, E. 22 Geo. 3, in which Lord *Mansfield* is reported to have said: "The constant usage since the stat. 19 Geo. 2, in a case of a total loss, has been to let the valuation stand, and the parties are estopped from altering it; but an average loss opens the policy. I will give you the origin of this custom: it was in a case of Erasmus *v.* Banks, Mich. 21 Geo. 2., where Lord C. J. *Lee* said: 'Valuation at the sum insured is an estoppel in case of a total loss, but not so in case of an average loss only.' On the 13th December, 1747, the same point came before the court in Smith *v.* Flexney, and was so determined." See also, Clark *v.* Unit. F. & M. Ins. Co., 7 Mass. 365, in which case *Sewall*, J., said: "The rule is however fixed and established by usages for a long time recognized, and by several judicial decisions, and is upon these considerations reasonable and satisfactory, that stipulations of value, when they are questioned and disputable, are to be disregarded in cases of partial and average losses."

[2] In Lewis *v.* Rucker, 2 Burr. 1167, a cargo of sugar was valued at thirty pounds per hogshead. A loss of about seventeen per cent. occurred. It was held by Lord *Mansfield* that the underwriters should pay seventeen per cent. of the agreed value. See also, the late case of Irving *v.* Manning, 1 H. L. Cas. 287, 6 C. B. 391, 419; Tunno *v.* Edwards, 12 East, 488; Usher *v.* Noble, id. 639, 646; Goldsmid *v.* Gillies, 4 Taunt. 803; Forbes *v.* Aspinall, 13 East, 323, 327; Harris *v.* Eagle F. Ins. Co. of N. Y., 5 Johns. 368; Brooke *v.* La. State Ins. Co., 16 Mart. La. 640, 648; Stevens & Benecke on Av., Phillips Ed. 1, 48.

[3] See post, Chapter on Abandonment.

The ship is very often valued; and the freight frequently, though the bills of lading generally would determine this amount very precisely; and the value of goods is so easily ascertained by the invoices and bills, that they are less frequently valued in the policy.

Where freight is valued, the valuation is presumed to apply to the freight of a full cargo, and, if a part only be at risk, it applies only *pro rata*.[1] If the freight be insured on time, or for a voyage consisting of distinct parts, each earning freight, the expressions and the circumstances as showing the intentions of the parties, must determine whether the valuation be of the whole freight to be earned in the whole time or the whole voyage, or whether it applies to each successive freight of an intermediate passage.[2]

An insurance is sometimes effected in fact on profits by a valuation of the goods which shall include profits; and sometimes

[1] Forbes *v.* Aspinall, 13 East, 323; Wolcott *v.* Eagle Ins. Co., 4 Pick. 429.

[2] We have already considered the question in our first volume, when different voyages are mentioned in a commercial instrument, the question whether they are distinct or not. See ante, Vol. I. p. 259, n. 1. The principles there laid down apply equally, we think, to the contract of insurance. And the general rule must be that an insurance to A, thence to B, and thence back to A, on freight valued at a certain amount, constitutes but one voyage, and that if freight is earned on the voyage from A to B, this will go as salvage to the underwriters on a loss occurring on the homeward voyage. The entirety of the voyage is shown by the class of cases, which we shall consider hereafter, where it is held that on a risk consisting of successive voyages, the contract is an entirety, and if the vessel is lost on the outward voyage, the whole freight is due. See Meech *v.* Philadelphia Fire & Inland Ins. Co., 3 Whart. 473; Adams *v.* Penn. Ins. Co., 1 Rawle, 97. Emerigon assumes this to be the general rule when he says: "The assured who has taken freights during the course of his trading voyage, is presumed to have taken them for himself, if the vessel arrive safe, and to have received them for account of the insurers, if disaster render abandonment necessary." Emerigon, c. xvii. § 9, Meredith's Ed. 708.

The principal exception to this rule is where the premium is double, in which case it has been held that the voyages are distinct. Davy *v.* Hallett, 3 Caines, 16; Hugg *v.* Augusta Ins. & Banking Co., 7 How. 595. In Patapsco Ins. Co. *v.* Biscoe, 7 Gill & J. 293, the premium was single, and the freight earned on the outer voyage was but half the amount of the valuation, and freight to the amount of the other half would have been earned on the return voyage, but the court held that the insured were entitled to recover the whole amount of the valuation without deducting the freight earned on the outward voyage. We are clearly of the opinion that this case extends the rule much further than it is authorized by principle and authority. In Wolcott *v.* Eagle Ins. Co., 4 Pick. 429, there was no freight earned on the outward voyage, and this question did not arise. See also Hughes *v.* Union Ins. Co., 8 Wheat. 294.

by an insurance of them as profits.[1] This insurance is generally valued, though not always nor necessarily so, because a loss of profits by a loss of the goods may be proved in the same way as the loss of any thing else.[2]

If the profits be insured and valued, it seems to be held, in England, not necessary to prove that the profits would have been as great as the valuation, but it is necessary to prove that there would have been some profits.[3] The construction of this valuation is more liberal in this country, not to say more just; for our courts hold that the loss of the goods *implies* absolutely some loss of profits, and the valuation settles conclusively the amount.[4]

We have already said that where the parties do not agree on, and express a valuation of the property insured, this value must be determined by evidence. The value insured is the value of the property — whether ship or goods — when the insurance took effect, and the premium constitutes a part of this value;[5] the

[1] Mumford *v.* Hallett, 1 Johns. 433; Patapsco Ins. Co. *v.* Coulter, 3 Pet. 222; Alsop *v.* Com. Ins. Co., 1 Sumner, 451; Halhead *v.* Young, 6 Ellis & B. 312, 36 Eng. L. & Eq. 109; Barclay *v.* Cousins, 2 East, 544; Hodgson *v.* Glover, 6 id. 316; Eyre *v.* Glover, 16 id. 218.

[2] In Mumford *v.* Hallett, 1 Johns. 433, insurance was effected on profits on goods valued at $2,500. Evidence was offered that this value was intended to apply to the profits and not to the goods, but it was rejected. The court, however, said: "Though the profits are not valued, yet every such insurance must, of necessity, be considered as a valued and not an open policy; especially if the goods themselves, as is the case here, are valued." Mr. *Benecke*, in his Treatise on Insurance, London ed., p. 28, is of the opinion that profits should always be insured in an open policy, on the ground that otherwise the form would be that of a wager. But experience has clearly demonstrated the expediency of making the valuation.

[3] In the earlier cases in England it seems to have been assumed that it was not necessary to show that profits would have been made if the goods had arrived. Barclay *v.* Cousins, 2 East, 544; Henrickson *v.* Margetson, id. 549, note. In Hodgson *v.* Glover, 6 East, 316, where Lord *Ellenborough* held, that the assured must show that there would have been some profit had the subject-matter of insurance arrived in safety, some of the judges put their decision upon another ground. See also, Eyre *v.* Glover, 16 East, 218.

[4] Patapsco Ins. Co. *v.* Coulter, 3 Pet. 222.

[5] Shawe *v.* Felton, 2 East, 109, 116; Usher *v.* Noble, 12 East, 639; Kemble *v.* Bowne, 1 Caines, 75, 82; Stevens *v.* Columbian Ins. Co., 3 Caines, 43; Minturn *v.* Columbian Ins. Co., 10 Johns. 75, 77; Clark *v.* United F. & M. Ins. Co., 7 Mass. 365, 369; Coffin *v.* Newburyport Mar. Ins. Co., 9 id. 436; Le Roy *v.* United Ins. Co., 7 Johns. 343; Carson *v.* Marine Ins. Co., 2 Wash. C. C. 468. The premium upon the premium is also, in an open policy, included in the insurable interest. Tuite *v.* Royal

general purpose of the law of insurance being to restore the insured to his original condition.[1] Hence the value of a ship insured will be the same through the whole period as it was at the beginning of the insurance, whatever be its decay through age.[2]

And all that properly belongs to it, as tackle, furniture, or apparel, and is necessary or proper as such for the voyage insured[3] — as the guns and ammunition of an armed vessel[4] — belong to the ship and should enter into the valuation. But in the adjustment of a claim for loss, although the *value* of the property does not vary with time, yet the *interest* of the insured at the time of the loss, must be that on which the adjustment is made.[5]

Although the value of the goods, when the risk attaches, determines the amount of the insured's interest; still, if the insurance is on successive passages, and the goods insured on the first are sold for more than their original value, and the whole proceeds invested in a new cargo, the insurance on this will be to the extent of the value, or cost, although this be greater than that of the original cargo.[6]

Exch. Ass. Co., 1 Park on Ins., 8th ed., 224, 1 Magens, 37, § 37; Pothier on Ins. n. 43. The calculation of premium upon premium is thus explained by Mr. *Benecke:* "The premium being contained in the sum which the underwriter pays, the assured for his indemnification receives only that part of it which exceeds the premium. Thus, if the assured, after having paid £20 for premium, receives £100, he obtains only £80 for prime cost and shipping charges. In order, therefore, to cover the premium fully, it will be necessary to insure £100 for every £100 *less the premium.* Or, in other words, to find the sum to be insured, multiply the amount, composed of the cost and charges at the place of departure, by one hundred, and divide the produce by one hundred less the number of per cents. of the premium." Benecke on Insurance, London ed., 120.

[1] Benecke on Insurance, London ed., 13; Carson *v.* Marine Ins. Co., 2 Wash. C. C. 468; Le Roy *v.* United Ins. Co., 7 Johns. 343.

[2] Shawe *v.* Felton, 2 East, 109; Snell *v.* Delaware Ins. Co., 4 Dall. 430; Weskett on Ins. 304, n. 9.

[3] Kemble *v.* Bowne, 1 Caines, 75, 80; Shawe *v.* Felton, 2 East, 109; Stevens & Benecke on Av., Phil. ed., 8, 9; Emerigon, ch. 9, § 6, Meredith's ed., 225.

[4] Emerigon, *ut supra;* 2 Valin, liv. iii. tit. vi. art. 15.

[5] See Howard *v.* Albany Ins. Co. per *Bronson,* C. J., 3 Denio, 301; and cases cited ante, p. 43, n. 1.

[6] Columbian Ins. Co. *v.* Catlett, 12 Wheat. 383. In this case an open policy for $10,000 was effected on a cargo of flour, on a voyage from Alexandria to St. Thomas, and two other ports in the West Indies, and back to the port of discharge in the United States. More than $3,000 worth of the flour was sold at St. Thomas, and the vessel

Generally, if the risk is divided into parts so as to cover successive periods, the value may rise or fall in those periods. Where it is not controlled by special circumstances, the value of goods is their invoice price.[1] To that, however, all fair, usual,

was afterwards wrecked. At the time the vessel sailed, the value of the flour on board amounted to more than $16,000; at the time of the loss it was worth over $12,000. The question arose whether, at the time of the loss, the policy covered the cargo then on board to the whole amount underwritten, or only twelve sixteenths of it, that is the portion covered at the commencement of the risk. It was held, that the policy covered $10,000 during the whole voyage out and home, so long as the insured had that amount on board. And that the loss must be apportioned between the parties in the proportion which the sum insured bore to the amount of the value at the time of the loss. See also, Crowley *v.* Cohen, 3 B. & Ad. 478.

[1] Stevens & Benecke on Average, Phillips ed., 32; Usher *v.* Noble, 12 East, 639; Gahn *v.* Broome, 1 Johns. Cas. 120. In this country it has been made a matter of doubt whether, in the adjustment of a loss under an open policy, the value of goods is to be taken to be their prime cost, their invoice price, or their actual market value at the commencement of the risk. The decisions are contradictory. In Le Roy *v.* United Ins. Co., 7 Johns. 343, hides, the prime cost of which was ten cents per pound, were invoiced at twelve cents per pound, the value at the time of shipment and of effecting insurance. Held, that in ascertaining the amount of loss, the hides should be reckoned at ten cents per pound. The court, however, disclaimed any intention of laying down a general rule. *Thompson*, J., admitted that "the prime cost of the goods might not, in many cases, be a just rule of computation, as where they were not purchased with a view to an immediate exportation, and had remained on hand for a considerable length of time. But in matters of commerce the plainest and simplest rules are always the best. And I should incline to think, that, generally speaking, the prime cost would be the best rule by which to test the value of the subject. The prime cost is commonly the market price of the article." In Coffin *v.* Newburyport Mar. Ins. Co., 9 Mass. 436, goods, invoiced at their real value at the time and place of shipment, which was greater than their prime cost, were reckoned at the invoice price. See Emerigon, ch. 9, sec. 4, Meredith's ed., 217. It is ably contended, by Mr. Justice *Washington*, in Carson *v.* Marine Ins. Co., 2 Wash. C. C. 468, that the true rule is to value the goods at their actual market value at the commencement of the risk. "Suppose," says he, "the property to be destroyed within an hour after the risk has commenced (and the time makes no difference in the principle), what does the owner lose? Precisely as much as it was worth, or would have commanded in the market at the time and place it was shipped, including expenses, and no more. If the property cost him less than it was worth when shipped, he loses as well the first cost as the increased value, for which he is entitled to claim an indemnity from the insurer. If it cost him more, he loses the difference between the first cost and the diminished value when the property was shipped; but for this difference, he can have no claim for indemnity under the contract, because the loss did not result from any of the perils against which an indemnity was stipulated, but from an unprofitable speculation, anterior to, and unconnected with, the contract. It is impossible that the first cost can ever furnish a just rule of indemnity, where it exceeds or falls short of the actual value of the property when it is put at risk. The invoice price, which was contended for on behalf of the plaintiffs, is liable to all the objections that exist against the prime cost, and to an

and reasonable charges are to be added; as commissions, expense of transport and storage, wages of labor, etc.[1] But the expenses to be incurred during the risk, as for freight, or other causes, are not to be added.[2] On the other hand, the drawback is not to be deducted from the value of exported goods.[3] And if the rate of exchange enters as an element into their cost or value, the rate at the beginning of the risk should, as we think, generally, be taken.[4]

additional one, which, in the opinion of the court, cannot be surmounted. It furnishes no rule of indemnity, in any case where it exceeds, or is less than the market value of the article; if the former, the insured is more than indemnified, by receiving more than it was worth; if the latter, which it is presumed will seldom, if ever, happen, his indemnity would be in part only. But the strong ground of objection to this rule for appreciating the value of the property at risk, is, that it substantially destroys all distinction between valued and open policies, and this, too, in the face of one of the best established rules of evidence. It makes a private document, created by one party to the contract, evidence against the other, as to a fact which it is essential for the former to prove in the ordinary way. In the case of a valued policy, the insured is relieved from the necessity of proving the amount of his loss, because both parties have agreed that the property at risk was worth so much. But, to bind the insurer by the arbitrary value fixed in the invoice, is to subject him to *ex parte* evidence, furnished by his opponent in the cause, without his agreement, and even without his knowledge of its contents when the contract was entered into. And as it rarely happens, if ever, that an invoice does not accompany the cargo, it would follow that all policies would in fact be valued; with this difference only, that what has hitherto been understood as valued policies, means nothing more than such as are valued by both parties, whereas open policies would be valued by one of the parties only." See also, Snell *v.* Delaware Ins. Co., 4 Dall. 430. The difficulties in the way of adopting the market value as the insured value in an open policy, are in bringing forward proof of such value. The invoice price should, without doubt, be taken to be *primâ facie* proof of the real insurable value. It cannot, however, be regarded as conclusive proof. Nor should the assured be prevented from invoicing the goods at their real, that is, market value, where they have risen in price since a purchase.

[1] Stevens & Benecke on Average, Phillips' ed., 32; Fontaine *v.* Columbian Ins. Co., 9 Johns. 29.

[2] Gibson *v.* Philadelphia Ins. Co., 1 Binn. 405. Nor can the insured, in making up the account of their loss on an open policy, charge both the price of the goods and a commission for the purchase of them by themselves. Anonymous, 1 Johns. 312.

[3] Gahn *v.* Broome, 1 Johns. Cas. 120; Minturn *v.* Columbian Ins. Co., 10 Johns. 75.

[4] In Thelluson *v.* Bewick, 1 Esp. 77, where goods were invoiced in the currency of France, Lord *Kenyon* held, that the rate of exchange at the time of the adjustment of the loss should govern; but this decision cannot be sustained upon principle, and is generally questioned by the text-writers. The question now seems to be, whether the current rate of exchange, at the time the risk commenced, or the legal par value is to be taken. Mr. *Arnould*, vol. 1, p. 330, citing an earlier edition of Mr. Phillips' work on Insurance, considers it the better rule to take the par value. But the rule of the

SECTION III.

WHAT KIND OF INTEREST MAY BE INSURED.

It may be said, generally, that any interest may be insured if the peril against which insurance is made would bring upon the

text is sustained by Mr. Phillips in his last edition. 2 Phillips' Ins. § 1231. This precise question does not appear to have arisen in any late insurance case, but a similar question has been discussed in cases where a party is sued in one country for money which was to be paid in another country. Mr. Justice *Washington*, in Smith *v.* Shaw, 2 Wash. C. C. 167, held, that the current rate of exchange was to be taken into consideration. And Mr. Justice *Story* expressed a strong opinion to the same effect in Grant *v.* Healey, 3 Sumner, 523. But in Martin *v.* Franklin, 4 Johns. 124; Scofield *v.* Day, 20 Johns. 102; and Adams *v.* Cordis, 8 Pick. 260, it was held, that the debt was to be paid at the par of exchange. The reason for the rule, as given in Martin *v.* Franklin, is, that "the courts are not to inquire into the disposition of the debt, after it reaches the party." In Lodge *v.* Spooner, Sup. Jud. Ct., Mass., March T. 1857, 20 Law Reporter, 289, a certain sum of money was to be paid in China on the performance of an agreement entered into between the parties. The plaintiff performed his part of the contract and claimed to recover, in addition to the original sum and interest, the rate of exchange between this country and China, at the time when the money should have been paid. But the court held, that he was not entitled to the exchange, and evidence that there was no tribunal in China, in which one foreigner could recover of another, and that these funds were to be invested in China, was held to be inadmissible.

We cannot but think that the American decisions, which hold that money to be paid abroad is to be paid here at the legal par, rest upon a great mistake of the courts, or rather upon their entire disregard of a great mistake made by our statutory provisions on this subject. In the Statute of 1799, ch. 22, sect. 61, 1 U. S. Stats. at Large, 673, it was provided that "each pound sterling of Great Britain shall be estimated at four dollars and forty-four cents." But this rate was about nine per cent. too low. That is, the gold or silver in, or represented by, one pound sterling in England, is equal to about four dollars and eighty-eight cents of our money. Or, in other words, the statute puts our dollar about nine per cent. too high, in comparison with the pound sterling. The consequence was at once a rise in our exchange on England of about nine per cent. to make the actual par; and so it has continued. The proof of this is, that when exchange is worth a little more than about nine per cent., it is worth more than the actual par, and gold goes from this country to England; and when the exchange is a little lower than this actual par, of about nine per cent., gold comes from England here. Thus, if a man owes a merchant in London one thousand pounds sterling, he will send him a bill for the amount, if he can buy it for what the law says it is worth and about nine per cent. more, for this is the best thing he can do. But if he cannot buy that bill for less than ten or twelve per cent., he will send the gold instead.

insured, by its immediate and direct effect, a pecuniary loss.[1] Thus, if a vessel is attached, it has been held, that a person who gives a bond to have her forthcoming, according to certain stipulations, has an insurable interest in the vessel.[2]

A purchaser may insure his property, although his title is

But if A here, sues B for one thousand pounds to be paid in England, and recovers, our courts have said, that B must pay him $4,440.00. But when B gets this in gold and ships this to England, he finds that he wants nearly four hundred dollars more, to give him there a thousand pounds sterling, because the law has rated the pound sterling too low and the dollar too high by that difference. We infer from remarks often made in books, which relate to our trade, etc., that the constant rate of about nine per cent. advance on exchange on England, is understood, even now, by some merchants and writers as arising from the state of our commerce. That this is not so is proved not only by the flow and reflux of gold turning on a point about nine per cent. advance, but by a later statute of the United States. It was found that when a duty (say twenty per cent.) was paid on the value of goods imported from England, and this value was taken by estimating the pound sterling at the legal par, the revenue lost twenty per cent. or one fifth, of about one eleventh part of all the value of English goods subject to ad valorem duties. Accordingly, in the Statute of 1842, c. 66, sect. 1, 5 U. S. Stats. at Large, 496, it was provided that "In all payments by or to the treasury, whether made here or in foreign countries, where it becomes necessary to compute the value of the pound sterling, it shall be deemed equal to four dollars and eighty-four cents, and the same rule shall be applied in appraising merchandise imported, where the value is by the invoice in pounds sterling." But while congress has thus acknowledged and rectified its mistake for revenue purposes, the legal par value remains as before between individuals, and they rectify it by the rate of exchange. And if courts see fit to adopt a fixed rate instead of the changing rate of commerce, it is obvious that great injustice is done, unless the revenue rate is adopted, instead of the general legal rate.

[1] "Interest does not necessarily imply a right to the whole, or a part of a thing, nor necessarily or exclusively that which may be the subject of privation, but the having some relation to, or concern in, the subject of insurance, which relation or concern, by the happening of the perils insured against, may be so affected as to produce a damage, detriment, or prejudice to the person insuring; and where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. The property of a thing, and the interest derivable from it may be very different; of the first, the price is generally the measure, but by interest in a thing every benefit and advantage, arising out of, or depending on such thing, may be considered as being comprehended." Per *Lawrence*, J., Lucena *v.* Craufurd, 5 B. & P. 269, 302. See s. c. 3 B. & P. 75; Craufurd *v.* Hunter, 8 T. R. 13; Stirling *v.* Vaughan, 11 East, 619. And Mr. Justice *Story*, in Hancox *v.* Fishing Ins. Co., 3 Sumner, 132, 140, said: "An insurable interest is *sui generis*, and peculiar in its texture and operation. It sometimes exists where there is not any present property, or *jus in re*, or *jus ad rem*. Inchoate rights, founded on subsisting titles, unless prohibited by the policy of the law, are insurable."

[2] Fireman's Ins. Co. *v.* Powell, 13 B. Mon. 311.

doubtful, if he bought and holds it *bonâ fide;* nor can the insurers defend against his claim by showing that his title was defeasible on account of some invalidity in the proceedings on which it rests.[1] Nor because the vendor has a lien on goods for the price and retains the right of stopping them *in transitu.*[2]

So one about to buy goods may insure them before they are bought; but he cannot recover under such a policy, unless the property is in him when the loss happens.[3] And any actual interest in a valid executory contract is insurable;[4] so, perhaps, is the interest of another in the share of a seaman in expected profits or catchings;[5] but this rule does not extend to a mere contingent probability or expectation.[6] If one has agreed to

[1] In Frierson *v.* Brenham, 5 La. Ann. 540, the insured had bought a steamboat at a sheriff's sale. The insurers were not allowed to set up the defence that the sale was void on account of fraud.

[2] That stoppage *in transitu* proceeds upon the ground of an equitable lien, and does not *rescind* the contract, see ante, vol. 1.

[3] Rhind *v.* Wilkinson, 2 Taunt. 237, 243; Col. Ins. Co. *v.* Lawrence, 2 Pet. 25; McGivney *v.* Phœnix Fire Ins. Co., 1 Wend. 85. It was decided in this case that a person, who was in possession of a house, and had agreed to purchase the same, and had made partial payments, and repaired the premises, had an insurable interest in the house. See also, Whitney *v.* Am. Ins. Co., 3 Cow. 210; Haven *v.* Gray, 12 Mass. 71, 74; M'Kim *v.* Phœnix Ins. Co., 2 Wash. C. C. 89.

[4] Lucena *v.* Craufurd, 5 B. & P. 269, 302, per *Lawrence*, J.; Rider *v.* Ocean Ins. Co., 20 Pick. 259; Col. Ins. Co. *v.* Lawrence, 2 Pet. 25, 10 Pet. 507.

[5] Hancox *v.* Fishing Ins. Co., 3 Sumner, 132. This was an insurance on clothes, shipped on a South Sea voyage, to be sold to the crew, and on the proceeds of them, which gave a lien on the share of the seamen in the profits of the voyage. Mr. Justice *Story* said: "In regard to another suggestion, that the policy is void as against public policy, because it in effect amounts to an insurance on seamen's wages, a few words may suffice. Assuming, for the purposes of the argument, that an insurance by the seamen themselves on their shares of the proceeds of the adventure would not be good, because they are in the nature of wages, though given in lieu of wages, a point upon which I desire to be understood as giving no opinion, it is a sufficient answer to the argument to say that the present is not the case of such an insurance. The plaintiff has insured his own interest in the voyage, and not theirs. They may, indeed, in a possible case be benefited by this insurance, but the policy itself is not on wages, or on shares in lieu of wages."

[6] Lucena *v.* Craufurd, 5 B. & P. 269, 294; Hancox *v.* Fishing Ins. Co., 3 Sumner, 132, 140. In Stockdale *v.* Dunlop, 6 M. & W. 224, the plaintiffs had made a verbal contract with H. & Co. for the purchase of one hundred tons of palm oil *to arrive* on board the Maria. "Oil to arrive," by mercantile usage, gives the vendee no right to it unless it arrive in the ship named. The plaintiffs had insured the goods and the profits on them; held, that they had no insurable interest. *Parke*, B., said: "I admit that profits may be insured, but that is on the ground that they form an additional part

bear and indemnify against certain risks, he may cause himself to be insured against the same risks.[1] And if the policy does not express and define the kind and nature of the interest, a change in this respect, as from absolute ownership to a mere right as mortgagee, or a right in equity to redeem, would not defeat the policy.[2] And if on a sale, the seller retains any actual interest, it may be insured.[3] And if the owner of a vessel contracts to sell her for a certain sum, and to give the vendee a clear title to the vessel upon payment of the price, his insurable interest is not limited to the agreed price, but extends to the full value of the vessel.[4] We know not why a seller may not insure his lien for the price, whether that can be enforced only by stoppage *in transitu*, or otherwise.

The policy by the usual words "lost or not lost" may be made retrospective, so as to operate during the period defined in it, if the property existed at the beginning of that period, although it had ceased to exist when the policy was made.[5] It may, perhaps, be retrospective even without these words, if such be its general import.[6]

A bailee, if he has a lien, or is responsible for any risk on the

of the value of the goods, in which the party has already an interest. Thus, the owner of goods on board a vessel, may insure the profits to arise from them. So may a consignee, or a factor in respect of his commission. So may captors, because they have a lawful possession, coupled with a well-founded expectation that their claim to retain the goods will be allowed. So may the owners of slaves, or a captain in respect of his commission. In these cases there is either an absolute or a special property in possession. There the profits are insured as an additional value upon the goods, in which the insurer has a present interest. Here, however, the assured are not interested at the time of the goods being put on board, but only upon their arrival." In Devaux *v.* Steele, 6 Bing. N. C. 358, it was shown that the French government sometimes granted a bounty to vessels, which performed a voyage similar to the one in that case. Held, that this did not constitute such a vested interest, as would entitle the owners to insure their expectation. See also, Brown *v.* Williams, 28 Maine, 252; Adams *v.* Penn. Ins. Co., 1 Rawle, 97; Knox *v.* Wood, 1 Camp. 543; Warder *v.* Horton, 4 Binn. 529.

[1] See post, title Reinsurance.

[2] See ante, p. 45, n. 1.

[3] Bell *v.* Firem. Ins. Co., 3 Rob. La. 423; Providence County Bank *v.* Benson, 24 Pick. 204.

[4] Stuart *v.* Columbian Ins. Co., 2 Cranch, C. C. 442.

[5] Paddock *v.* Franklin Ins. Co., 11 Pick. 227; Hucks *v.* Thornton, 1 Holt, N. P. 30.

[6] Hammond *v.* Allen, 2 Sumner, 387, 396, per *Story*, J. See also, March *v.* Pigot, 5 Burr. 2802.

property bailed, may insure it.[1] And a consignee with power to sell has an insurable interest, and if the consignor afterwards assents, he will be liable for the premium and entitled to the benefit of the policy.[2] A creditor, as such, has no insurable interest; thus, if his claim be for repairs on a ship, he has no insurable interest in the ship,[3] unless he have a lien on it for his repairs.[4] If the proceeds of goods shipped are to be paid to a creditor by express bargain, he may insure them.[5]

If the insured have a sufficient interest at the making of the policy, it may be defeated afterwards, only however by that which operates as a complete divesting of it.[6] Thus, neither attachment of goods, nor seizure on execution before sale,[7] nor a contract to convey the subject insured at a future day, on payment of the purchase-money,[8] nor an assignment of the amount secured by the policy, although the assignee be in possession of the insured property under a bond for a deed from the original insured,[9] nor a stoppage *in transitu* by one who sold the goods

[1] Crowley *v.* Cohen, 3 B. & Ad. 478; Waters *v.* Monarch F. & L. Ins. Co., 5 Ellis & B. 870, 34 Eng. L. & Eq. 116; Van Natta *v.* Mut. Security Ins. Co., 2 Sandf. 490. In this case, the plaintiff insured the cargo of a canal boat generally. Held, that he might recover on proving that he had a special interest in it as a common carrier. See also, Chase *v.* Wash. M. Ins. Co., 12 Barb. 595.

[2] Pouverin *v.* La. State M. & F. Ins. Co., 4 Rob. La. 234.

[3] Buchanan *v.* Ocean Ins. Co., 6 Cow. 318.

[4] Tasker *v.* Scott, 6 Taunt. 234, 1 Marsh. 556; Seamans *v.* Loring, 1 Mason, 127; Protection Ins. Co. *v.* Hall, 15 B. Mon. 411. So if money is advanced to the owners of a ship, and the freight is pledged to the persons so advancing it, they may insure the freight. Wilson *v.* Martin, 11 Exch. 684, 34 Eng. L. & Eq. 496. If the creditor has merely a common law lien, his interest is gone with the loss of possession. Folsom *v.* Merch. Mut. Mar. Ins. Co., 38 Maine, 414.

[5] Aldrich *v.* Equitable Safety Ins. Co., 1 Woodb. & M. 272. So where they are assigned to him as collateral security. Wells *v.* Phil. Ins. Co., 9 S. & R. 103.

[6] Hibbert *v.* Carter, 1 T. R. 745; Locke *v.* North American Ins. Co., 13 Mass. 61; Lazarus *v.* Comm. Ins. Co., 5 Pick. 76. Nothing short of a conveyance of the property insured amounts to an alienation. Masters *v.* Madison Co. Mut. Ins. Co., 11 Barb. 624. See also, ante, p. 44–47.

[7] Clark *v.* New England Mut. F. Ins. Co., 6 Cush. 342; Rice *v.* Tower, 1 Gray, 426; Bell *v.* Western Mar. & F. Ins. Co., 5 Rob. La. 423; Franklin F. Ins. Co. *v.* Findlay, 6 Whart. 483.

[8] Trumbull *v.* Portage Co. Mut. Ins. Co., 12 Ohio, 305; Perry Co. Ins. Co. *v.* Stewart, 19 Penn. State, 45; Masters *v.* Madison Co. Mut. Ins. Co., 11 Barb. 624.

[9] Phillips *v.* Merrimack Mut. F. Ins. Co., 10 Cush. 350.

to the insured,[1] nor capture before valid condemnation, works a defeasance of the interest.[2] By the common law, in many instances, the property was not forfeited till seizure, so that the rights of the owner would remain till that took place.[3] It appears to us clear on principle, though the doctrine is somewhat shaken by the later decisions, that the breach of a statute law which works a forfeiture, vests the property immediately in government, and the insurable interest of the owner ceases as soon as the breach takes place.[4] But if the government has the right of

[1] See ante, p. 76, n. 2.

[2] East India Co. *v.* Sands, cited 10 Mod. 79; Lucena *v.* Craufurd, 5 B. & P. 269, 319, per Lord *Eldon*, C. J.; The Arrogante Barcelones, 7 Wheat. 496; The Bello Corrunes, 6 id. 152.

[3] See the authorities collected in the elaborate opinions of Mr. Justice *Story*, in the case of The Brig Mars, 1 Gallis. 192, and of Mr. Justice *Winchester* in the case of The Anthony Mangin, 2 Pet. Adm. 452. But at common law a seizure before condemnation vested the property in the government. Wilkins *v.* Despard, 5 T. R. 112; Pipon *v.* Cope, 1 Camp. 434; Thomas *v.* Withers, before *Gould*, J., cited 5 T. R. 117; Hennel *v.* Perry, before Lord *Mansfield*, C. J., cited 5 T. R. 117.

[4] Fontaine *v.* Phœnix Ins. Co., 11 Johns. 293; Amory *v.* M'Gregor, 15 Johns. 24. In United States *v.* 1,960 Bags of Coffee, 8 Cranch, 398, and United States *v.* The Mars, id. 417, it was held that the forfeiture took place the moment the act was done, and that a person who became a *bonâ fide* purchaser before seizure had no rights as against the government. See also, Gelston *v.* Hoyt, 3 Wheat. 246. The words of the statute creating the forfeiture, under which the cases of United States *v.* 1,960 Bags of Coffee, and United States *v.* The Mars, were decided, are "that whenever any articles, the importation of which is prohibited by this act shall be imported into the United States, all such articles shall be forfeited." In Clark *v.* Protection Ins. Co., 1 Story, 109, 134, Mr. Justice *Story* said: "It is not correct to say, that property forfeited is vested in the government at the very moment of forfeiture, and the title of the owner immediately divested. On the contrary, the established doctrine is, that notwithstanding the forfeiture, the property remains in the owner until it is actually seized by the government, and then by seizure the title of the government relates back to the time of the forfeiture. In the case of United States *v.* 1,960 Bags of Coffee, and Gelston *v.* Hoyt, there had been a seizure and prosecution for the forfeiture by the government. The case of The Mars, in this court, 1 Gallis. 192, 198, as to this point, has never, to my knowledge, been doubted or denied." On referring to the case of United States *v.* The Mars, 8 Cranch, 417, we find that no opinion was given, the court stating that it depended on the coffee case, and therefore ordered the decree of the circuit court to be reversed. Mr. Justice *Johnson* in delivering the opinion of the court in the coffee case, stated that the question rested altogether on the act of congress; that it belonged to congress "to decide on what event a divesture of right should take place, whether on the commission of the offence, the seizure, or the condemnation;" and that the court were of the opinion "that the commission of the offence marked the point of time on which the statutory transfer of right takes place." It thus appears

election, either to seize the property, or to proceed against the party violating the law for the value, the property does not vest in government till the election is made, and until that time the insurable interest doubtless remains.[1]

A lender on bottomry or respondentia, who necessarily loses his debt if the ship or goods pledged be lost, has an insurable interest in them.[2] And any mortgagee has an insurable interest in the property mortgaged to the amount of his claim, whether this arises from money loaned, a previous debt, or a liability incurred.[3]

that this case was decided on the sole ground that the forfeiture divested the rights of the owner, and vested the right of property immediately in government.

This case of Clark *v.* Protection Ins. Co., and Polleys *v.* Ocean Ins. Co., 14 Maine, 141, decide that the ship may be insured after the forfeiture and before the seizure. And the latter case is confirmed to some extent by the language of Mr. Justice *Story* in the Supreme Court of the United States to which the case was taken. Ocean Ins. Co. *v.* Polleys, 13 Pet. 157. The decision of the court, however, proceeded on the ground that there was no jurisdiction. It is to be observed that the argument presented for the defence in this latter case was, that the vessel was sailing under circumstances which rendered her liable to forfeiture, and that the policy was therefore void. But if the defence had been taken that the interest in the insured ceased by the act of forfeiture, it would be difficult to see how the case could be reconciled with the earlier decisions of the Supreme Court above referred to.

[1] United States *v.* Grundy, 3 Cranch, 337.

[2] See this subject treated of at the end of ch. 7.

[3] Smith *v.* Lascelles, 2 T. R. 187; Irving *v.* Richardson, 2 B. & Ad. 193, 1 Moody & R. 153; Trader's Ins. Co. *v.* Robert, 9 Wend. 404. The mortgagee cannot insure to the whole value of the property and charge the premiums to the mortgagor, if there is no contract between them that the insurance shall be at the mortgagor's expense, and if it is effected without his being privy to it. Dobson *v.* Land, 8 Hare, 216, 13 Law Reporter, 247; White *v.* Brown, 2 Cush. 412, 415. The insurable interest of the mortgagee, is confined to the amount of the mortgage debt. Per *Story*, J., in Carpenter *v.* Providence Washington Ins. Co., 16 Pet. 495, 502; per *Gibson*, C. J., in Smith *v.* Columbia Ins. Co., 17 Penn. State, 253, 260. It has also been held in a late case in Pennsylvania, that a mortgagee who has insured the mortgaged property cannot recover of the insurer, unless the security is impaired, at least not without transferring the mortgage. This is a question different from, yet intimately connected with, that discussed in the following note. The one is, whether the assurer is bound to pay a loss, although the remaining security is ample, or if he is called upon to pay such loss, whether he can require a transfer of the mortgage itself; the other, whether he can demand an assignment of the mortgage debt. In Smith *v.* Columbia Ins. Co., 17 Penn. State, 253, it was held, that a mortgagee insured, was bound to communicate to the insurers, the fact that he held prior incumbrances on the same property, on the ground that they would diminish the amount of property to which the insurers would have a right to resort in case they paid a loss; that not having done so, he could not

It has been generally supposed that a mortgagee who recovers on a policy, thereby puts the insurers in his place by a kind of

recover without assigning to the insurers all the mortgages held by him on the property insured. *Gibson*, C. J., said : "Notwithstanding the form of the contract, therefore, a mortgagee insures, whether generally or specially, not the ultimate safety of the whole of the property, but only so much of it as may be enough to satisfy his mortgage. It is not the specific property that is insured, but its capacity to pay the mortgage debt. In effect, the security is insured. The fallacy of the argument on the part of the plaintiff below is in assuming that the words in the policy, "to pay, make good, and satisfy all such damages or loss which shall or may happen by fire to the property," bind the insurer to pay in every case to the extent of an outside price, for which it might be sold unencumbered in the market. What is the property insured? Not the thing independent of ownership; for if the law were otherwise, the policy might to some extent be a wagering one. The beneficial interest in it is insured, and only to the value of it can the owner recover for a loss of it, because the contract of insurance is strictly a contract of indemnity. No one would pretend that the mortgagee of a house, who had insured it, could recover for the burning of a few shingles in the roof of it, though the unimpaired value of the building might be much greater than the amount of the mortgage. The insurer, having paid the mortgage debt, is entitled to have recourse to the mortgage property; and any concealment of facts which would lessen its value, would be an injury to him. That he is entitled to a cession of the security is proved by analogies from marine insurance, from fire insurance in respect to recourse to the hundred, and from the contract of suretyship." And in Kernochan *v.* New York Bowery F. Ins. Co., 5 Duer, 1, 17 N. Y. 428, it was held that in the event of a total loss the mortgagee is entitled to recover the whole sum insured, provided it does not exceed the amount due on the mortgage at the time of the loss, and evidence is not admissible to show that notwithstanding the loss, the mortgaged premises continued to be a full security for the debt. This was decided on the ground that the insurer is entitled to be subrogated to the rights of the mortgagee, and therefore it was also held that the mortgagee is bound to disclose if he has made any transfer of the mortgage securities, which would impair the rights of the insurer. We prefer the doctrine of these cases to that of King *v.* State Mut. Ins. Co., 7 Cush. 1. See also, Foster *v.* Equitable Mut. F. Ins. Co., 2 Gray, 216, where it was expressly decided that the mortgagee's right to recover on the policy is not affected by the repair of the loss by the owner of the equity of redemption. See post, p. 82, n. 2.

Where the interest of the assured is not that of a mortgagee, but of one having a lien, it would seem to be clearly opposed to the spirit of the contract of insurance, to hold the insurers liable for a loss which does not in any way impair the security. Thus A having property of B in his hands to the amount of $20,000, upon which he has made advances to the amount of $5,000, insures that amount upon the property. A loss to the amount of $5,000 happens. The assured has still in his possession property of the value of $15,000. Can it be said that a loss, within the meaning and spirit of the contract of insurance, has happened to the assured? Owing to the fact that the losses in the case of liens have been total losses, this question has received but slight attention. The better view would seem to be that the assured could have no claim upon the insurers, unless the property were totally destroyed, or reduced in value below the amount for which the assured had the lien. In the latter case the assured could only recover for so much as the property saved fell short in value of the

subrogation, and should give to them, or hold as their trustee, his claim against the debtor. But this doctrine may be considered as somewhat shaken by late decisions in Massachusetts,[1] in which the mortgagee is permitted to retain for his own use both the amount of the debt and the sum paid him by the insurers. These cases, however, were upon fire policies, and were somewhat peculiar in their facts, and the law in regard to marine policies may still be, and we think it is, as above stated.[2]

amount of the lien, and he would be bound to transfer a proportionate part of the debt.

The mortgagor has an insurable interest to the full value of the property mortgaged, he being liable at all events to pay the mortgage debt. Alston *v.* Campbell, 4 Brown, P. C. 476; Hibbert *v.* Carter, 1 T. R. 745; Locke *v.* North American Ins. Co., 13 Mass. 61; Higginson *v.* Dall, 13 Mass. 96; Lazarus *v.* Commonwealth Ins. Co., 19 Pick. 81.

[1] King *v.* State Mutual Ins. Co., 7 Cush. 1; Foster *v.* Equitable Ins. Co., 2 Gray, 216.

[2] The nature and extent of the insurable interest of a mortgagee, or of one having a lien, have not as yet received clear and final adjudication from the courts; and the legal rights of the insurers and the assured have not been satisfactorily defined. In the first place, it may be laid down as settled law, that where a mortgagee, or one having a lien, insures his own interest in property, a payment of a loss to him by the insurers does not discharge the debt, for which the mortgage or the lien is the security. The want of privity between the mortgagors and the insurers is a conclusive objection to the mortgagors' claim to such discharge. Ætna Fire Ins. Co. *v.* Tyler, 16 Wend. 385, 397, per *Walworth*, Chancellor; Carpenter *v.* Providence Washington Ins. Co., 16 Pet. 495, 501, per Mr. Justice *Story;* White *v.* Brown, 2 Cush. 412; King *v.* State Mutual F. Ins. Co., 7 Cush. 1, 4, per *Shaw*, C. J. See also, Humphrey *v.* Arabin, Lloyd & Goold, temp. Plunk. 318; Hart *v.* Western Railroad Corporation, 13 Met. 99. Where, however, the mortgagee is trustee for the mortgagor, as where the mortgagor causes insurance to be made on the premises payable to the mortgagee in case of loss, or where the mortgagee effects insurance at the expense of the mortgagor with his consent, payment by the insurers would go in discharge of the debt. Ex parte Andrews, 2 Rose, 410; Dobson *v.* Land, 8 Hare, 216, 13 Law Reporter, 247; King *v.* State Mut. F. Ins. Co., 7 Cush. 1, 5, per *Shaw*, C. J.; Fowley *v.* Palmer, 5 Gray, 549. Another, and a more difficult question is, whether this same want of privity can be conclusively urged, where the insurers, upon the payment of a loss to the mortgagee, he having insured for his own benefit, and paid the premium out of his own funds, demand a transfer of a corresponding part of the mortgage debt. The case of King *v.* State Mut. F. Ins. Co., 7 Cush. 1, takes very strong ground in favor of the affirmative of this question. In this case, a mortgagee insured his interest in property mortgaged, without describing the nature of his interest. Upon the happening of a loss, the mortgagee was permitted to recover of the insurers without assigning the mortgage debt. *Shaw*, C. J., in delivering the opinion of the court, said: "The court are of opinion that the plaintiff having insured for his own benefit, and paid the premium out of his own funds, and the loss having occurred by the peril insured against, he has, *primâ facie*, a good right to recover; and having the same insurable interest at the time of the loss which he had

In general all persons who have a lien on any property [1] as salvors,[2] or who may make any pecuniary gain out of property,

at the time of the contract of insurance, he is entitled to recover a total loss. The court are further of opinion that if the defendants could have any claim, should the plaintiff hereafter recover his debt in full of the mortgagor, it must be purely equitable; that the defendants can have no claim until such money is recovered, if at all; and therefore, that they have no right to demand the partial transfer of the mortgage debt, by them required, as a condition to their liability to pay, pursuant to the terms of their policy. This consideration is perhaps decisive of the present case; but the case having been argued upon broader grounds, and some authorities cited to sustain the claim of the defendants, which may give rise to further litigation, we have thought it best to consider the other question now. We are inclined to the opinion, both upon principle and authority, that when a mortgagee causes insurance to be made for his own benefit, paying the premium from his own funds, in case a loss occurs before his debt is paid, he has a right to receive the total loss for his own benefit; that he is not bound to account to the mortgagor for any part of the money so recovered, as a part of the mortgage debt; it is not a payment in whole or in part; but he has still a right to recover his whole debt of the mortgagor." This decision seems to run counter to what has been the general opinion in respect to the rights of the insurers and the assured where the interest covered is a mortgage interest. It would seem, also, as we have said in a preceding note, to be opposed to correct views of the nature of the contract of insurance as being a contract of indemnity. It will be seen that the court confine their decision to the case where the mortgagee insures generally, without specifying the nature of his interest. We think, however, that, whether the interest is specified or not, the insurer upon the payment of a loss, is entitled to have secured to him, the debt of the mortgagor, or some portion of it, corresponding to the amount insured. There would seem to be no sufficient reason why a distinction should be drawn between the two cases where the mortgage interest is specified and where it is not. Where the mortgagee insures, as such, why, if the doctrine of King *v.* State Mut. F. Ins. Co. is sound, should it not be held, as in that case, that the mortgage debt merely determines the amount beyond which the insurers cannot be held liable? The mere specification of the nature of the interest, would not seem to be a sufficient reason for holding that the contract of insurance was made with reference to the mortgage security in such a sense, as to give a right to the insurers to demand a transfer of the debt. If this be not so, a concealment of the nature of the title, would enlarge the rights of the assured and place him in a better condition. The solution of this entire question depends upon the construction to be given to the contract of insurance. Is the engagement of the insurers, to answer to the assured (whether the interest is specified or not) for any and every loss by a peril insured against, to the extent of the mortgage debt; or, in other words, does the mortgage debt merely fix the limit beyond which the insurers cannot be held liable, leaving the rights and liabilities of the parties in all other respects the same as if the assured were owner of the entire estate; or is the engagement of the insurers merely to stand in the place of the assured, and to

[1] Wolff *v.* Horncastle, 1 B. & P. 316; Carruthers *v.* Sheddon, 6 Taunt. 14; Briggs *v.* Merchant Trader's Association, 13 Q. B. 167; Russel *v.* Union Ins. Co., 4 Dall. 421, 1 Wash. C. C. 409.

[2] Knill *v.* Hooper, 2 H. & N. 277.

as factors on commissions,[1] consignees,[2] agents, carriers, or other bailees, may insure whatever interest they have.[3] Possession,

incur the same risks as he is incurring? The latter is the view that we take of the contract. The mortgagee's motive in insuring is to preserve his security, and the insurance must be construed to be made with express reference to the mortgage interest, whether specified or not. The mortgagee runs no risk as to the debt itself, apart from the security, which the insurers are not also running, provided they have a right of claiming a transfer of the debt. To say there is no privity between the mortgagor and the insurer, does not solve the difficulty. There clearly is no privity, and therefore, as we have seen, the mortgagor cannot claim the benefit of the insurance; but so far as the rights and liabilities of the insurer are concerned, it is not a question of privity or want of privity; but one wholly of construction; what has the insurer engaged to do? All the ends of indemnity can be best gained if the assured is held bound to transfer the mortgage debt to the insurers. And it may be added, that from the beginning of insurance law, it seems to have been an unquestionable principle, that insurers who pay a total loss, are subrogated to all the rights, interests, and claims of the insured, in or about the interest insured. On this principle the whole law of abandonment rests. And the foundation of this principle, as of the whole law of insurance, is indemnity.

We think that this view best accords with the decided cases, and with the settled principles of the law of insurance. Mr. Justice *Story*, in Carpenter *v.* Providence Washington Ins. Co., 16 Pet. 495, 501, uses the following language, directly to the point: "Where the mortgagee insures solely on his own account, it is but an insurance of his debt; and if his debt is afterwards paid or extinguished, the policy ceases from that time to have any operation; and even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustains no damage thereby." See also, the language of *Walworth*, Chancellor, in Ætna F. Ins. Co. *v.* Tyler, 16 Wend. 385, 397, and the recent case of Kernochan *v.* New York Bowery F. Ins. Co., 5 Duer, 1, 17 N. Y. 428. Moreover, the case of King *v.* State Mutual Fire Ins. Co. seems hardly consistent with a prior decision of the same court. It is provided by statute in Massachusetts that railroad corporations shall be responsible for losses by

[1] Flint *v.* Le Mesurier, Park on Ins. 355; Russel *v.* Union Ins. Co., 4 Dall. 421, 1 Wash. C. C. 409.

[2] Putnam *v.* Mercantile Marine Ins. Co., 5 Met. 386. In this case it was held, that a commission merchant, to whom the cargo of a vessel was consigned for sale, might insure his expected commissions, while the vessel was on her voyage. Mr. Justice *Hubbard*, in delivering the opinion of the court said: "The law of insurance has been most reasonably extended to embrace within its provisions cases where the parties, having no ownership of the property, have a lien upon it, or such an interest connected with its safety and its situation, as will cause them to sustain a direct loss from its destruction or from its not reaching its proper place of destination. Such rights have received protection, and the expectation of profits, the loan upon mortgage or respondentia, the advances of a consignee, an agent or factor, and the commissions of a master or supercargo, are all now the well-recognized subjects of insurance." See also, French *v.* Hope Ins. Co., 16 Pick. 397; Crowley *v.* Cohen, 3 B. & Ad. 478; De Forest *v.* Fulton F. Ins. Co., 1 Hall, 84.

[3] See ante, p. 78, n. 1.

or at least, a *quasi* possession may be, however, necessary; and it may, therefore, be doubted whether a mere agent for sale, or broker wholly without possession, has any insurable interest in the property he is employed to sell.

fire caused by their locomotives, "to the person or corporation injured." In Hart *v.* Western Railroad Corporation, 13 Met. 99, a house, which was insured, was destroyed by a fire communicated to it indirectly by a locomotive engine of the defendants. The underwriters paid the owner the amount of the loss, and then brought this action in his name against the corporation. It was held, that they were entitled to maintain it, and that the owner could not interfere with this right by releasing all claims against the corporation. *Shaw*, C. J., said: "Now when the owner, who *primâ facie* stands to the whole risk, and suffers the whole loss, has engaged another person to be at that particular risk for him, in whole or in part, the owner and the insurer are, in respect to that ownership and the risk incident to it, in effect one person, having together the beneficial right to an indemnity provided by law for those who sustain a loss by that particular cause. If, therefore, the owner demands and receives payment of that very loss from the insurer, as he may, by virtue of his contract, there is a manifest equity in transferring the right to indemnity, which he holds for the common benefit, to the assurer. It is one and the same loss, for which he has a claim of indemnity, and he can equitably receive but one satisfaction. Where such an equity exists, the party holding the legal right is conscientiously bound to make an assignment, in equity, to the person entitled to the benefit; and if he fails to do so, the *cestui que trust* may sue in the name of the trustee, and his equitable interest will be protected." Why should not the contract of the assured, in this case, be construed to be as independent of the statute liability of the railroad company as in case of the mortgagee? It was not contended that the insurers came within the description of the statute as the "person or corporation injured," for the insurers were compelled to bring the action in the name of the assured. The right of the insurers to have the right of action against the railroad corporation transferred to them, depended upon the construction given to the contract of insurance. It was construed as an engagement to run the precise risks the assured would otherwise have been compelled to run. The fact that the right of action given to the assured was a right of action for causing the very loss for which by contract the insurers were liable, could not, it would seem, affect the question, nor could the fact that the insurers must have known that there was a right of action against the railroad company. Could the fact that the mortgage is not specified; that, in fact, the mortgagee conceals his interest, enlarge his rights? See also, Quebec Fire Ins. Co. *v.* St. Louis, 7 Moore, P. C. 286, 22 Eng. L. & Eq. 73; Mason *v.* Sainsbury, 2 Marsh. Ins. 794, 3 Doug. 61; Clark *v.* Inhabitants of Blything, 2 B. & C. 254, 3 Dowl. & R. 489.

To these considerations it may be added, that in life insurance it was formerly held, that if a creditor insured the life of his debtor, and the debtor died, leaving ample means to pay the debt, the insurers were discharged. Godsall *v.* Boldero, 9 East, 72. But this case is now overthrown; expressly on the ground that life insurance is *not* a contract of indemnity, and that it herein differs from marine and fire insurances, which *are* contracts of indemnity. Law *v.* London Indisputable Life Policy Co., 1 Kay & J. 223; Dalby *v.* India & Lond. Life Ass. Co., 15 C. B. 365, 28 Eng. L. & Eq. 312. See Loomis *v.* Eagle Life & Health Ins. Co., 6 Gray, 396.

Freight is one of the things which is most frequently insured. The interest of the owner of the ship in freight, begins as soon as the party who has goods to ship, or has bargained to carry goods for another, has either begun the voyage, or has taken steps and expended money towards earning the freight; the ship being in readiness; and her destination, or voyage to earn the freight, being determined.[1]

The ship-owner has also an insurable interest if he has purchased goods to be shipped on his own account, or has made a

[1] The general rule is said to be that the insurable interest does not begin till the goods are on board. Tonge *v.* Watts, 2 Stra. 1251. See also, Smith *v.* Steinback, 2 Caines' Cas. 158. But if a charter-party, or an agreement, whether under seal, in writing, or by parol, has been entered into, whereby the owner contracts to go to a certain port and there take on board a cargo, the interest commences as soon as the ship breaks ground on the outward passage. Thompson *v.* Taylor, 6 T. R. 478; Parke *v.* Hebson, cited 2 Brod. & B. 329; Horncastle *v.* Suart, 7 East, 400; Davidson *v.* Willasey, 1 M. & S. 313; Moses *v.* Pratt, 4 Camp. 297; Patrick *v.* Eames, 3 Camp. 441; Livingston *v.* Columbian Ins. Co., 3 Johns. 49; Adams *v.* Warren Ins. Co., 22 Pick. 163; Robinson *v.* Manufacturers' Ins. Co., 1 Met. 143, 146. In this case *Shaw*, C. J., stated the law as follows: "In general the inception of a voyage even in ballast, from one port to another to take a cargo, pursuant to a charter-party, is an inception of the voyage on which freight is to be earned, and if the vessel is lost before arriving at the first port to take in the cargo, it is a loss on freight." See also, Hodgson *v.* Miss. Ins. Co., 2 La. 341. In Mackenzie *v.* Shedden, 2 Camp. 431, insurance was effected "at and from Sherness in ballast to Charente, and back to a port in the British Channel, and London, from the date hereof till the ship should be arrived at Charente, and back at a port in the channel and London, on freight valued at the sum insured to be deemed interest on the outward voyage, although in ballast." By the charter-party the ship was to be freighted at Charente. On her arrival there she was put under an embargo, and, at the expiration of six months, was seized and condemned. It was admitted that if the vessel had been lost on the outward voyage, the defendant would have been liable, but it was contended that the policy was suspended from the time of the ship's arrival until she began to load, but Lord *Ellenborough* was of the opinion, that, taking the whole contract together, this was not the intention of the parties, and that the plaintiff was therefore entitled to recover.

In Thompson *v.* Taylor, *supra*, Lord *Kenyon*, C. J., said: "As the plaintiff had begun to perform his part of the contract, as he had done something under it which, if matured, would have entitled him to his freight, I think he may recover on this policy, which was an insurance on that freight." On the authority of this opinion it was held, in Truscott *v.* Christie, 2 Brod. & B. 320, where a contract had been entered into to carry goods, and a certain number of passengers for government, and it was stipulated that certain alterations should be made in the vessel, that the plaintiff might recover under a policy insuring his freight and passage-money, the voyage being put an end to by a peril of the seas, part of the goods being on board, and the alterations having been commenced.

valid contract to procure them; and the ship is on her way to a port for that purpose.[1]

If, however, the policy contains the common clause, "beginning the adventure upon the said freight from and immediately following the loading thereof," or any provision of equal force, the risk does not commence until the goods are on board, although they are bought or engaged for the ship, and the ship is at the port ready for them.[2] And if a ship sails on a voyage of barter, and after exchanging a part of her outward cargo, proceeds with the residue to another port for the purpose of making a similar barter, but is lost before this is effected, the insurers are liable only for the freight of the goods on board, however great may be the certainty that the remaining part of the outward cargo would be exchanged for a full return cargo.[3]

A charterer may insure not only any earnings he may make,

[1] In Devaux *v.* J'Anson, 5 Bing. N. C. 519, insurance was effected on freight at and from the Coromandel coast to Bourbon. The ship put into a port on the coast for repairs, and was lost by an accident in coming out of the dock. The cargo, which had been purchased, was about seven miles from the port, and ready to be sent on board. It was held, that there was a total loss of freight. See also, Flint *v.* Flemyng, 1 B. & Ad. 45; Williamson *v.* Innes, 8 Bing. 81, n., 1 Moody & R. 88. In Hart *v.* Delaware Ins. Co., 2 Wash. C. C. 346, freight was insured at and from New York to Wilmington, and at and from thence to Barbadoes, etc. A cargo of staves was provided at Wilmington, for which place the vessel sailed from New York, but was lost on the way. Mr. Justice *Washington* charged the jury, that although the plaintiffs had not an insurable interest before the cargo was taken on board, yet they might insure their expected profits, and the defendants were liable if such was the understanding of the parties. And a strong opinion was expressed that the risk was intended to commence when the voyage did, because the defendants knew that the cargo was to be taken on board at Wilmington, and the vessel and freight were insured at the same premium, and the vessel was insured in and out of port during the whole voyage.

[2] Gordon *v.* Am. Ins. Co. of N. Y., 4 Denio, 360. See also, Royal Exch. Ass. Co. *v.* M'Swiney, 14 Q. B. 646, in the Exchequer Chamber, reversing the decision in the Queen's Bench, 14 Q. B. 634; Halhead *v.* Young, 6 Ellis & B. 312, 36 Eng. L. & Eq. 109. In Robinson *v.* Manufacturers' Ins. Co., 1 Met. 143, the insurance was "on freight *on board* ship Herald, at and from Cadiz to a port in Sicily," etc. It was contended that this meant "freight when laden on board," but the court held, that it meant the same as freight of the vessel. In Montgomery *v.* Eggington, 3 T. R. 362, some of the goods were on board when the vessel was lost, the rest were ready to be shipped, and lying on the quay for that purpose. It was held, that the insured might recover freight for the whole. So, if the insurance is on freight "carried or not carried." De Longuemere *v.* Phœnix Ins. Co., 10 Johns. 127; De Longuemere *v.* N. Y. Fire Ins. Co., 10 Johns. 201.

[3] Forbes *v.* Aspinall, 13 East, 323; Forbes *v.* Cowie, 1 Camp. 520; Adams *v.* Pennsylvania Ins. Co., 1 Rawle, 97; Riley *v.* Hartford Ins. Co., 2 Conn. 368.

or excess of money he may receive over that he must pay, but any advances he makes, if they remain at his risk, and are not repayable by the owner in case of loss.[1] But one advancing money on freight, has no insurable interest if the money so advanced is to be repaid to him if the goods do not arrive.[2]

The freight of any severable part of a voyage may be insured.[3]

The insurance is void if the interest is illegal; or if a material and inseparable part of the contract or transaction be illegal;[4] or if the insurance itself be expressly prohibited; or if the interest and insurance be in themselves legal, but the whole transaction contemplates an illegal use of the subject-matter of the insurance. A good illustration is found in a case where a ship was bound to a port prohibited by the laws of this country, and the policy expressly provided that no exceptions were to be taken on account of "ports interdicted by the laws of the United States;" and the policy was held to be void.[5] For the purpose of this rule, an act subject to a penalty is illegal, although it be not prohibited in direct terms.[6] And if by the laws of the country

[1] Ellis *v.* Lafone, 8 Exch. 546, 18 Eng. L. & Eq. 559; Manfield *v.* Maitland, 4 B. & Ald. 582, 585, per *Abbott*, C. J. See also, Robbins *v.* New York Ins. Co., 1 Hall, 325; Sansom *v.* Ball, 4 Dall. 459.

[2] Manfield *v.* Maitland, 4 B. & Ald. 582; Wilson *v.* Royal Exch. Ass. Co., 2 Camp. 623. See also, Winter *v.* Haldimand, 2 B. & Ad. 649.

[3] Taylor *v.* Wilson, 15 East, 324.

[4] "It may be laid down as a general rule, that, where a voyage is illegal, an insurance upon such voyage is illegal." Per *Tindal*, C. J., Redmond *v.* Smith, 7 Man. & G. 457, 474. See Mount *v.* Waite, 7 Johns. 434.

[5] Russell *v.* Degrand, 15 Mass. 35. The insurance in this case was from Boston to a port of discharge in Europe. At the time the policy was made, a statute was in force prohibiting all vessels from going to any port in France or England. There was evidence tending to show that, at the time the policy was made, it was intended that the vessel should go to France, and that she afterwards sailed for and arrived at a port of that country. The contract was held to be illegal and void.

[6] In Bartlett *v.* Vinor, Carth. 251, the law is thus stated by *Holt*, C. J.: "Every contract made for, or about any matter or thing, which is prohibited and made unlawful by statute, is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute." This is cited and adopted by *Tindal*, C. J., in De Begnis *v.* Armistead, 10 Bing. 107; and by *Story*, J., in Clark *v.* Protection Ins. Co., 1 Story, 109, 122. See also, Farmer *v.* Legg, 7 T. R. 186; Gallini *v.* Laborie, 5 T. R. 242; Law *v.* Hodgson, 2 Camp. 147, 11 East, 300; Langton *v.* Hughes, 1 M. & S. 593.

to which the ship belongs a certain traffic is forbidden, an insurance of the ship, as well as one on the cargo, is void.[1]

This illegality need not be express, or spring from the violation, actual or intended, of a positive law; it has the same effect if it be only in distinct opposition to the principles or policy of the law. It is upon these grounds that wagering policies,[2] and the insurance of the wages of mariners or mates by themselves,[3] are held to be illegal and void; but mariners may insure

[1] Gray *v.* Sims, 3 Wash. C. C. 276.

[2] In Amory *v.* Gilman, 2 Mass. 1, 13, *Dana*, C. J., said: "As wager policies are injurious to the morals of the citizens, tend to encourage an extravagant and peculiarly hazardous species of gaming, and to expose their property, which ought to be reserved for the benefit of real commerce, they ought not to receive the countenance of this court." See also, Stetson *v.* Mass. Mut. F. Ins. Co., 4 Mass. 330, 336; Lord *v.* Dall, 12 Mass. 115, 118; King *v.* State Mutual F. Ins. Co., 7 Cush. 1, 10; Alsop *v.* Commercial Ins. Co., 1 Sumner, 451, 464. Such insurances were held to be valid in New York, before the Revised Statutes of 1830 went into operation. Juhel *v.* Church, 2 Johns. Cas. 333; Clendining *v.* Church, 3 Caines, 141. But in some of the other States wagers have been held void. Hoit *v.* Hodge, 6 N. H. 104; Pritchet *v.* Ins. Co. of North America, 3 Yeates, 458; Collamer *v.* Day, 2 Vt. 144. In Alsop *v.* Commercial Ins. Co., 1 Sumner, 451, the plaintiff was insured "ten thousand dollars on profits on merchandise on board the Brig Leonora at and from Callao to Baltimore free of average and salvage, and the policy to be the only proof of interest required." This was held not to be a wager policy, as the assured had property on board. See also, Valton *v.* National Loan Fund Life Ass. Co., 22 Barb. 9. In England wager policies were valid at common law. Dean *v.* Dicker, 2 Stra. 1250; Assievedo *v.* Cambridge, 10 Mod. 77; Depaba *v.* Ludlow, 1 Comyns, 361; Da Costa *v.* Firth, 4 Burr. 1966; Lucena *v.* Craufurd, 3 B. & P. 75, 101; Good *v.* Elliott, 3 T. R. 693. See however the following cases in chancery. Whittingham *v.* Thornborough, Prec. in Chan. 20; Goddart *v.* Garrett, 2 Vern. 269; Le Pyre *v.* Farr, 2 Vern. 716. And by statute 19 Geo. 2, c. 37, they were made illegal. This statute only applies to British ships and goods. Thellusson *v.* Fletcher, 1 Doug. 315; Craufurd *v.* Hunter, 8 T. R. 13, 24. It must appear on the face of the policy whether it is a wager policy or not. Cousins *v.* Nantes, 3 Taunt. 513. See also, Murphy *v.* Bell, 4 Bing. 567; Smith *v.* Reynolds, 1 H. & N. 221, 38 Eng. L. & Eq. 292, where it is held that an insurance on profits is an insurance on goods within the statute 19 Geo. 2, c. 37, § 1.

[3] Emerigon, ch. 8, s. 10, Meredith's Ed. 191. In The Juliana, 2 Dods. 504, 509, Lord *Stowell* states the reason of the law, as follows: "The mariner is not permitted to insure his wages by the policy of our law, in order that he may be stimulated to all possible personal exertion for the preservation of the ship, on which alone all his own interests are made to depend." See also, Lucena *v.* Craufurd, 5 B. & P. 269, 294; Webster *v.* De Tastet, 7 T. R. 157; The Neptune, 1 Hagg. Adm. 227, 239. Nor can they take advantage of an insurance effected by the owners upon the ship, freight, or cargo. The Lady Durham, 3 Hagg. Adm. 196, 200; M'Quirk *v.* The Penelope, 2 Pet. Adm. 276; Icard *v.* Goold, 11 Johns. 279.

their goods on board, although bought by their wages.[1] A master may insure his commissions, his wages, or the freight of goods carried by him on his privilege.[2] And if the master sails the vessel on shares, he has an insurable interest in the freight to the amount of his share, and his indebtedness on account of the freight in addition.[3] But a master who sells a cargo at auction, and buys it in to prevent a loss, does not thereby become the owner of it so as to have an insurable interest.[4] If it be uncertain whether the interest be illegal or not, the contract being subject to two constructions, or two modes of interpretation, one legal and the other not, the presumption of law is in favor of that which is legal.[5] And if the transaction be legal in its commencement, and is made illegal by a subsequent law, the insured will not be affected by such subsequent illegality, until he knew of the law, or might, from the circumstances of the case, be reasonably presumed to have known it.[6] Nor will a mere intent to do wrong, if not executed, or agreed upon by the parties, avoid the contract,[7] nor will a remote, incidental, or collateral illegality, as smuggling on board stores or furniture,[8] or not stowing provisions as required by law,[9] or, perhaps, the not taking on board of

[1] Galloway *v.* Morris, 3 Yeates, 445; 1 Mag. 18; Weskett on Ins. 587; Emerigon, ch. 8, § 10, Meredith's Ed. 191.

[2] King *v.* Glover, 5 B. & P. 206; Holbrook *v.* Brown, 2 Mass. 280; Foster *v.* Hoyt, 2 Johns. Cas. 327.

[3] Haynes *v.* Rowe, 40 Maine, 181.

[4] Barker *v.* Marine Ins. Co., 2 Mason, 369.

[5] Muller *v.* Thompson, 2 Camp. 610; Wright *v.* Welbie, 1 Chitty, 49; Gill *v.* Dunlop, 7 Taunt. 193; Haines *v.* Busk, 5 Taunt. 521; Thornton *v.* Lance, 4 Camp. 231; Blackburne *v.* Thompson, 15 East, 81, 3 Camp. 61.

[6] Walden *v.* Phœnix Ins. Co., 5 Johns. 310.

[7] "A mere intention to do an illegal act, or other act, which would avoid a policy, if done, but which has never been consummated by any act, has never, as far as I know, been deemed *per se* to vitiate the policy. There is in all cases of this sort a *locus pœnitentiæ;* there must be the act and the intent coupled together." Per *Story*, J., Clark *v.* Protection Ins. Co., 1 Story, 109, 124. See also, The Abby, 5 Rob. Adm. 251; Waters *v.* Allen, 5 Hill, 421. Where the act is that of trading with a country known to be hostile, the commencement of the voyage is a sufficient act of illegality. The Abby, *supra;* Lubbock *v.* Potts, 7 East, 449.

[8] Clark *v.* Protection Ins. Co., 1 Story, 109, 132. See also, Ocean Ins. Co. *v.* Polleys, 13 Pet. 157; Ward *v.* Wood, 13 Mass. 539; Carruthers *v.* Gray, 15 East, 35.

[9] Warren *v.* Manufacturers' Ins. Co., 13 Pick. 518; Deshon *v.* Merchants' Ins. Co., 11 Met. 199.

a pilot in conformity with statutory provisions,[1] or purchasing goods with the proceeds of a previous illegal cargo or voyage.[2]

If a part of a severable voyage or cargo be legal and a part illegal, the insurance on the legal part will be good.[3] But if a material part of the property of the party insured is illegal, this avoids the whole insurance.[4]

[1] Flanigen *v.* Wash. Ins. Co., 7 Barr, 306; Keeler *v.* Firem. Ins. Co., 3 Hill, 250. See post, as to whether a vessel without a pilot is sea-worthy.

[2] Bird *v.* Appleton, 8 T. R. 562. See also, Bell *v.* Gilson, 1 B. & P. 345, 353; Armstrong *v.* Toler, 11 Wheat. 258.

[3] The Jonge Clara, Edw. Adm. 371, 373; Pieschell *v.* Allnutt, 4 Taunt. 792; Sewell *v.* Royal Exch. Ass. Co., 4 Taunt. 856.

[4] In Clark *v.* Protection Ins. Co., 1 Story, 109, 125, Mr. Justice *Story*, after stating that Lord *Kenyon*, in Bird *v.* Pigou, 2 Selw. N. P. 991, decided that if any part of an integral voyage be illegal, a policy on the integral voyage is void, says: "It is true that Lord *Kenyon* is reported in Wilson *v.* Marryat, 8 T. R. 31, to have gone further, and to have said, that if there were any infirmity or illegality in any part of the integral voyage, it would have made the whole voyage illegal, so that the assured could not recover on a policy on any part of it, even a policy on that part alone which was legal. This was a mere *obiter dictum*, not called for by the case; and it is certainly somewhat shaken, although not overturned, by the decision in Bird *v.* Appleton, 8 T. R. 562. It will be found exceedingly difficult in point of principle to distinguish between an illegality in a former voyage, and that in a prior part of a sound voyage, where the policy covers only the part of the voyage which is legal."

In Parkin *v.* Dick, 11 East, 502, 2 Camp. 221, the action was on a policy of insurance on goods of the plaintiff of the value of £10,000, from London to Brazil. The exportation of a small part of the goods, valued at less than £600, was prohibited, under penalty of forfeiture of the ship and prohibited goods. It was held that the policy was void *in toto*, and Lord *Ellenborough* said: "It has been decided a hundred times, that if a party insure goods altogether in one policy, and some of them are of a nature to make a voyage illegal, the whole contract is illegal and void." See Camelo *v.* Britten, 4 B. & Ald. 184; Gordon *v.* Vaughan, 12 East, 302. But in Keir *v.* Andrade, 6 Taunt. 498, 300 barrels of gunpowder were shipped under a license covering 150 barrels, and the exportation of the other 150 was admitted to be illegal. The action was brought upon a policy of insurance covering the whole. The plaintiff recovered for the part protected by the license. See Butler *v.* Allnutt, 1 Stark. 222; Pieschell *v.* Allnutt, 4 Taunt. 792; Shiffner *v.* Gordon, 12 East, 296. The cases of Parkin *v.* Dick and Kier *v.* Andrade can hardly be reconciled, but there appears to be a somewhat nice distinction existing between them. At common law, if the consideration is illegal in part, the whole contract is void; but there appears to be no reason why a promise, founded on a valid consideration, should be void, because illegal in part, unless the promise be indivisible, or unless the whole contract is presumed to be entered into with the same intention. But it cannot be said in the case of Parkin *v.* Dick, that the contract was so far indivisible, that, if void in part, it must necessarily have been void *in toto*, for it is clear that the court would have severed it in case either of a partial shipment or a partial loss. Hence, the only ground upon which the decision is sustainable, is that the illegal intent, with which a part of the contract was entered

An owner of a ship insured abroad, cannot have his claim under a policy defeated in the country where the policy is made, by an inquiry into his compliance with the registry laws of his own country;[1] and it seems to be the better opinion, that his claim is not defeasible at home by the want of such conformity, if his ownership be actual and *bonâ fide*.[2]

into, was presumed to extend to the whole. This appears from the language of Lord *Ellenborough* to have been the ground of the decision. For he relies upon the fact that the whole voyage was made illegal, although it is clear that, under the statute, none but the prohibited goods could be confiscated. This being the ground of the decision, it might well be held that the effect of the intent to commit an illegal act, should not extend beyond the goods actually prohibited, in a case in which the voyage had been expressly legalized by a license. This distinction, nice as it may seem, appears to be the only one which will reconcile these cases, and it was clearly in the mind of Mr. Justice *Story*, when, in the case of Clark *v.* Protection Ins. Co., 1 Story, 109, 129, he said, in commenting upon Keir *v.* Andrade: "But the court thought, that as the voyage was, under the license, in itself legal, the illegal exportation of a part of the property insured, did not affect that which was within the license." It is true that he considered Keir *v.* Andrade "a strong case," but it was expressly upon the ground, that the whole enterprise must be presumed to have been commenced and prosecuted with the same intent.

[1] Rhind *v.* Wilkinson, 2 Taunt. 237.

[2] In England, under the Registry Act of 26 Geo. III. c. 60, s. 3, all unregistered transfers of property in a ship were made "utterly null and void to all intents and purposes." Hence all insurances on freight, or any present interest in a ship by one who was not registered as owner, were held to be void. Camden *v.* Anderson, 5 T. R. 709; Marsh *v.* Robinson, 4 Esp. 98; Everth *v.* Blackburne, 2 Stark. 66; Campbell *v.* Stein, 6 Dow, 116; Rolleston *v.* Hibbert, 3 T. R. 406. But a mere clerical mistake will not vitiate the bill of sale. Rolleston *v.* Smith, 4 T. R. 161. But the early registry laws in the United States only rendered such transfer invalid, so as to deprive the transferree of the privileges of nationality, as we have seen in our first volume, p. 40–46. In Ocean Ins. Co. *v.* Polleys, 13 Pet. 157, it was held that an insurance was valid upon a ship sailing under circumstances which rendered her liable to forfeiture for a violation of the registry law of the United States. See this case discussed, ante, p. 79, n. 4. In Bixby *v.* Franklin Ins. Co., 8 Pick. 86, the policy was made in the names of Bixby, Valentine & Co., and Hibbert, the master. The firm consisted of Bixby, Valentine & Holmes. Before the partnership was formed, the brig was owned by Holmes and Hibbert, in whose names she continued to be registered at the custom-house, until the loss occurred. The court held that, Holmes having sold out a portion of his half, and the partnership being formed, the transfer on the books of the firm was, as between Holmes and his partners, a sufficient transfer, and that the fact of the vessel not being transferred on the custom-house register, could not affect the question, unless the sale were contested by a creditor of Holmes. See also, Vinal *v.* Burrill, 16 Pick. 401; Ring *v.* Franklin, 2 Hall, 1. Nor do we think that the Registry Act of 1850, c. 27, 9 U. S. Stats. at Large, 440, affects this question. This provides, "That no bill of sale, mortgage, hypothecation, or conveyance of any vessel or part of any vessel of the United States, shall be valid against

One kind of illegality frequently occurs, and questions relating to it are often of much importance; that of a contraband trade, which is a trade with a belligerent, intended to provide him with military supplies, equipments, instruments, or arms.[1] Goods are contraband, which are in fact munitions of war, or may certainly become so, or which are designed, or capable of being used for the support or assistance of an enemy in carrying on war, offensively or defensively.[2] Thus, even provisions,

any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled." There seems to be no reason why an owner, though the transfer to him be not registered, should not be able to insure his interest, notwithstanding the provisions of the statute. Would it be argued that a purchaser of real estate could not insure his house because his deed had not been recorded? There seems to be no distinction between the two cases. Under the statute 3 and 4 Will. 4, c. 55, it has been held that a mortgage is good between the parties, though the particulars thereof are not indorsed on the certificate of registry. Lister *v.* Payn, 11 Sim. 348.

[1] Richardson *v.* Maine F. & M. Ins. Co., 6 Mass. 102, 114.

[2] Grotius divided all articles of commerce into three classes. 1. Those used only in war, as arms, etc. 2. Those of no use in war, as articles of luxury. 3. Those which are of use both in war and peace, as money, provisions, ships, and naval stores. The first class he considered always contraband, the second never, and the third as depending on circumstances. Grotius, de jure Belli ac Pacis, lib. iii. c. 1, § 5. But since the time of Grotius, marine ordinances, treaties, and adjudications, influenced by the changes in the means of carrying on war, have made some articles contraband, which were formerly not so. The following is the result of the adjudications. Ships of war, destined to an enemy's port, to be there sold, are considered contraband. The Richmond, 5 Rob. Adm. 331; The Brutus, 5 Rob. Adm. 331, n., and Appendix. So is sail-cloth, under all circumstances. The Neptunus, 3 Rob. Adm. 108. Rosin, if destined for a military port of the enemy. The Nostra Signora de Begona, 5 Rob. Adm. 97. Brimstone, under some circumstances, will be considered contraband. The Ship Carpenter, 2 Act. 11. Tallow, if destined to a port merely of naval equipment, will be deemed contraband, but not, if the port also possesses an extensive trade, and mercantile character. The Neptunus, 6 Rob. Adm. 403. Timber for ship-building, also masts, if going to an enemy's port of naval equipment, become contraband. The Staadt Embden, 1 Rob. Adm. 26; The Endraught, 1 Rob. Adm. 22, 25; The Twende Brodre, 4 Rob. Adm. 33. Pitch and tar, which are not the products of the country exporting, are contraband. The Twee Juffrowen, 4 Rob. Adm. 242; The Jonge Tobias, 1 Rob. Adm. 329; The Richmond, 5 Rob. Adm. 325. But it has been held that pitch and tar, being Swedish property, and conveyed in Swedish vessels, are not subject to confiscation, but simply to the rights of preoccupancy and preëmption, "it being considered," in the words of Sir *W. Scott*, "a harsh exercise of a belligerent right to prohibit the carriage of these articles, which constitute so considerable a part of the native produce and ordinary commerce of the country." The Maria, 1 Rob. Adm. 340, 373; The Christina Maria, 4 Rob. Adm. 166; The Sarah

if they are intended to be sent to a place which an enemy is attempting to reduce by starvation.[1] And, in general, articles ordinarily used only for peaceful purposes, if capable of a military use, and sent to places where it is probable that such a use will be made of them, are contraband of war; and so is all property

Christina, 1 Rob. Adm. 237, 241. See also, The Charlotte, 1 Act. 201; The Neptunus, 6 Rob. Adm. 403. This is contrary to an early decision of the Lords of Appeal in the case of The Med Good's Hielp, cited 1 Rob. Adm. 29, 373. Hemp is generally contraband. The Ringende Jacob, 1 Rob. Adm. 89; but that which is not fit for naval purposes (The Gute Gesellschaft Michael, 4 Rob. Adm. 94), or which is the product of the exporting country, and embarked in its vessels (The Apollo, 4 Rob. Adm. 158), is not considered contraband, but the *onus probandi* lies upon the claimant. The Evert, 4 Rob. Adm. 354. Anchors are contraband. The Jonge Margaretha, 1 Rob. Adm. 189, 194. So is copper in sheets. The Charlotte, 5 Rob. Adm. 275. See also, generally, Azuni on Maritime Law, part 2, ch. 2, art. 5.

[1] In the case of The Jonge Margaretha, 1 Rob. Adm. 189, the law on this subject is most ably set forth by Lord *Stowell*, as follows: "I take the modern established rule to be this, that generally they (provisions) are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it. Among the circumstances which tend to preserve provisions from being liable to be treated as contraband, one is, that they are of the growth of the country which exports them. Another circumstance, to which some indulgence, by the practice of nations, is shown, is, when the articles are in their native and unmanufactured state. But the most important distinction is, whether the articles were intended for the ordinary use of life, or even for mercantile ship's use; or whether they were going with a highly probable destination to military use. Of the matter of fact, on which the distinction is to be applied, the nature and quality of the port to which the articles were going, is not an irrational test; if the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war, may be constructed in that port. *Contra*, if the great predominating character of a port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption. The presumption of a hostile use, founded on its destination to a military port, is very much inflamed, if at the time the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful." This was a case of a neutral carrying a cargo of provisions, cheese, not the product and manufacture of his own country, but of the enemy's ally in war, to the great port of naval equipment of the enemy, and the cargo was therefore condemned. See also, The Jonge Andreas, cited 1 Rob. Adm. 193; The Jonge Frederick, cited 1 Rob. Adm. 193; The Joannes, cited 1 Rob. Adm. 193; The Endraght, cited 1 Rob. Adm. 190; The Juffrow Magdalena, cited 1 Rob. Adm. 190; The Welvaart, cited 1 Rob. Adm. 195; The Haabet, 2 Rob. Adm. 174, 182; The Edward, 4 Rob. Adm. 68; The Frau Margaretha, 6 Rob. Adm. 92; The Zelden Rust, 6 Rob. Adm. 93; The Richmond, 5 Rob. Adm. 325, 327; The Ranger, 6 Rob. Adm. 125; The Commercen, 1 Wheat. 382, 2 Gallis. 261; Maisonnaire *v.* Keating, 2 Gallis. 325.

destined to a besieged or blockaded town or port.[1] A distinction is also taken between articles in their native and unmanufactured state, and the same articles when made up into implements, or what may be used as such.[2] Innocent neutral goods, that is, those not contraband, cannot by the law of nations be legally captured by a belligerent. And no contraband trade is illegal in the country of the neutral who carries it on.[3]

Whether the contraband character of the ship or goods continues to the end of the whole voyage, or terminates with the passage in which the contraband trade is intended or done, may not be certain, but we think the better opinion is in favor of the latter rule.[4] Whether the rule which forfeits a whole cargo for the illegal character of a distinct part, is to be extended to the

[1] See 1st vol.; also The Nayade, 1 Newb. Adm. 366; The Bark Coosa, 1 Newb. Adm. 393.

[2] Thus Sir *Wm. Scott*, in the case of The Jonge Margaretha, 1 Rob. Adm. 189, 194, said: "Iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favorably considered than cordage; and wheat is not considered so noxious a commodity as any of the final preparations of it for human use."

[3] Pond *v.* Smith, 4 Conn. 297; Seton *v.* Low, 1 Johns. Cas. 1; Skidmore *v.* Desdoity, 2 Johns. Cas. 77; Juhel *v.* Rhinelander, 2 Johns. Cas. 120, 487; De Peyster *v.* Gardner, 1 Caines, 492; Richardson *v.* Maine F. & M. Ins. Co., 6 Mass. 102, 113; The Santissima Trinidad, 7 Wheat. 283, 340. See also, Howland *v.* Com. Ins. Co., Anthon, N. P. 26; Baltimore Ins. Co. *v.* Taylor, 3 Harris & J. 198.

[4] In Carrington *v.* Merchants' Ins. Co., 8 Pet. 495, 520, *Story*, J., said: "When the contraband goods have been deposited at the port of destination, and the subsequent voyage has thus been disconnected with the noxious articles, it has not been usual to apply the penalty to the ship or cargo upon the return voyage, although the latter may be the proceeds of the contraband. And the same rule would seem, by analogy, to apply to cases where the contraband articles have been deposited at an intermediate port on the outward voyage, and before it had terminated; although there is not any authority directly in point. But in the highest prize courts in England, while the distinction between the outward and homeward voyage is admitted to govern, yet it is established that it exists only in favor of neutrals who conduct themselves with fairness and good faith in the arrangements of the voyage. If, with a view to practise a fraud upon the belligerent, and to escape from his acknowledged right of capture and detention, the voyage is disguised, and the vessel sails under false papers and with a false destination, the mere deposit of the contraband in the course of the voyage, is not allowed to purge away the guilt of the fraudulent conduct of the neutral." The Rosalie & Betty, 2 Rob. Adm. 343; The Rosalia, 4 Rob. Adm. note to table of cases; Parkman *v.* Allen, 1 Stair's Decis. 529, 6 Rob. Adm. 382, note; The Baltic, 1 Act. 25; The Christiansberg, 6 Rob. Adm. 376, 381; The Nancy, 3 Rob. Adm. 122, 126; The Randers Bye, 6 Rob. Adm. 382, n.; The Margaret, 1 Act. 333; The Joseph, 1 Gallis. 545, 8 Cranch, 451. See 2 Wheaton on International Law, p. 219.

illegality of contraband, is not certain; it has been so extended in some English cases, but this may be regarded as extreme, if not excessive. The general rule as to the effect of contraband may, we think, be stated thus: If contraband goods are on board, all goods belonging to the owner of the contraband goods are forfeited. The lawful goods belonging to other shippers are not forfeited. The owner of the ship loses the freight and charges to which he is entitled on the goods thus forfeited; but he loses no more, unless he is also the owner of the contraband goods, or attempts to protect them by the cover of false papers or false destination, or some other fraud; and in either of these cases, the ship is liable to confiscation.[1]

SECTION IV.

OF PRIOR INSURANCE, DOUBLE INSURANCE, AND REINSURANCE.

The marine policies of this country, usually, contain a clause to the effect, that if there be any prior insurance, the insurers shall be liable only for so much as the prior insurance may fail to insure of the property. Of course, under such a provision, a second policy insures only the uninsured excess of interest remaining after the first; the third policy the same excess remaining after the second, and so on.[2] And this clause relates

[1] Carrington *v.* Merchants' Ins. Co., 8 Pet. 495, 520, per *Story*, J.; The Jonge Tobias, 1 Rob. Adm. 329; The Stadt Embden, id. 26; The Ringende Jacob, id. 89; The Mercurius, id. 288; The Franklin, 3 Rob. Adm. 217; The Edward, 4 Rob. Adm. 68; The Ranger, 6 Rob. Adm. 125. Nearly all of the questions respecting contraband trade have been affected by treaties.

[2] The "American clause," as it is called, is not expressed in the same language in all our policies. A form in common use provides, "that if the assured shall have made any other assurance upon the subject insured prior in date to this policy, the assurers shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the subject insured, and shall return the premium upon so much of the sum by them assured as they shall be, by such prior insurance, exonerated from; and in case of any insurance upon the subject-matter, subsequent in date to this policy, the assurers shall, nevertheless, be answerable for the full extent of the sum by them subscribed, without right to claim contribution from such subsequent assurer, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made."

to a priority in effecting the insurance, and not to priority in the commencement of the risk; and the actual time of making the contract may, for this purpose, be proved to be different from its written date.[1]

If policies bear date on the same day, the court will inquire into fractions of a day, and determine the priority by ascertaining which was first made.[2] In some policies the clause is to the effect, that an insured shall recover only that proportion of the loss which the amount insured in his policy bears to the whole amount insured on that property.[3]

If the prior policy is deducted, only that amount which the insurers are liable to pay under it beyond the amount of the premium is deducted.[4] And if the value of the property is greater in a second policy, only the actual amount insured in the first is to be deducted, and not that amount increased in the same proportion as is the value in the second.[5]

If the whole property is covered by the first policy for a part of the time when the second should attach, so that there is nothing to which it can thus attach, it will be suspended, and will begin to attach when the first policy is exhausted.[6]

It seems to have been decided, that if there be divers policies and property enough when all attach for all to take effect, and this property is afterwards diminished, the effect of the clause remains, so that the last policy is first discharged, and then the last but one, and so on, as the property lessens; but it has been strongly doubted, and for good reasons, whether the true rule be not, that in such a case, a diminution in the property *after all had*

See Peters *v.* Delaware Ins. Co., 5 S. & R. 473; American Ins. Co. *v.* Griswold, 14 Wend. 399. Under this clause, the usage in New York appears to be, that where there are two or more policies on the same cargo and risk, of different dates, and interest to supply them all, if a partial loss takes place while all the goods are on board, the several policies contribute in proportion to the sum insured by each policy. Am. Ins. Co. *v.* Griswold, 14 Wend. 399.

[1] Lee *v.* Mass. Fire & Mar. Ins. Co., 6 Mass. 208.

[2] Potter *v.* Marine Ins. Co., 2 Mason, 475; Brown *v.* Hartford Ins. Co., 3 Day, 58.

[3] Lucas *v.* Jeff. Ins. Co., 6 Cowen, 635; Howard Ins. Co. of N. Y. *v.* Scribner, 5 Hill, 298.

[4] 2 Phillips, Ins. 1257.

[5] Murray *v.* Ins. Co. of Penn., 2 Wash. C. C. 186. See M'Kim *v.* Phœnix Ins. Co., id. 89.

[6] Kent *v.* Manufacturers' Ins. Co., 18 Pick. 19.

attached, leaves the remainder to be distributed *pro rata* among all the policies.[1]

[1] This question was discussed at great length and with great ability in the case of American Ins. Co. *v.* Griswold, 14 Wend. 399, and the first rule laid down in the text was adopted by the Supreme Court, and the decision was sustained by the Court of Errors. But Senator Tracy gave a very able dissenting opinion in favor of the second rule in the text, and his opinion is favored by Mr. Phillips. 2 Phillips on Ins. § 1261. The question depends entirely upon the construction of the American clause. (See *supra*, p. 96, n. 2.) And it appears that either rule may be drawn from it without doing violence to its language.

In favor of holding the first insurer liable to the full extent of his insurance, although a part of the cargo had been taken away, it was urged that the old English rule and the continental law substituted the second underwriter in the place of the insured, as to the interest not covered by the first policy, so that the liability of the first underwriter was in no way affected by the second insurance; that the modern English rule was introduced by Lord *Mansfield* in Newby *v.* Reed, 1 W. Bl. 416, and adopted in this country in Thurston *v.* Koch, 4 Dallas, 348, and that the American clause, introduced immediately after the latter decision, was obviously intended to restore the old rule, and that such intention was expressed in the clause in appropriate and explicit language.

On the other hand, it was urged, and, as we think, shown, in the dissenting opinion, that the words of the clause would be satisfied, by exonerating the subsequent insurers in those cases only in which there was not property enough at the commencement of the risk for all the policies to attach; and that there was an obvious want of equity in taking the burden from some of the insurers and imposing it upon the others, in a case where all are allowed to retain the premiums. If it can also be shown that the old English rule was confined to cases in which all the policies could not attach at the commencement of the risk, and did not apply to a case like the present, the better rule would seem to be to require the insurers to pay in proportion to the amount subscribed by each. And such we are inclined to think the case.

It is clear that the application of plain common law principles to several contracts of insurance against the same risk, would require an equal distribution of the burden, and such the law seems always to have been, unless affected by some custom of merchants. Malynes, the oldest authority, speaks of the practice of exonerating the subsequent insurers as "a *rare custom* of merchants," and says, "and so a law not observed is inferior to a custom well observed," plainly intimating that the practice was not in conformity with the old law. Malynes' Lex Mercatoria, 112. So in the African Co. *v.* Bull, 1 Show. 132, the custom was specially pleaded. Thus both the authorities cited in support of the old rule admit it to be an innovation upon the common law which would have held them all equally liable. If this is so, the English rule would extend no further than the custom. But both the authorities above cited extend the custom only to cases in which the policy never attaches, so that the premium is returned by the subsequent insurers. Malynes says: "The custom is, that those assurers that have last subscribed to the policy of assurance, *bear not any adventure at all*, and must make restitution of the premium by them received." In the case in 1 Shower, the reasonableness of the custom is defended expressly on the ground that the subsequent insurers return the premium. There is no evidence whatever that the custom was ever

If there be no such clause as that just mentioned, and various underwriters insure at different times more than the whole value, it seems to be the rule both in England and in this country, that the insured may recover his whole amount from any whom he may elect to sue; but not more than the whole; and that they who pay may demand contribution from the others, so that each shall pay towards the whole amount of the loss, the sum which bears towards that whole amount, the proportion which all that he insured bears to the whole amount insured on that property. This rule considers, or makes, all the insurers guarantors for each other; and the insured, by getting insurance on property already insured, in fact gets insurance on his insurer.[1] If the first policy be open and the other valued, and the insured cede to the first insurer as much as he insures and obtains payment as for a total loss, and he has short property on board, he can only recover on the valued policy for the loss on the property he could cede on the same.[2]

Where there is the usual clause respecting prior insurance, it does not apply if the policies are simultaneous; for in that case

extended to a case where all the policies have once attached, and a right to retain all the premiums accrued.

We have the more confidence in this view of the question, because the adjudication in American Ins. Co. *v.* Griswold appears to be reconcilable with it. As that was a trading voyage, and a relative proportion of the premium was to be returned for each month which was not commenced, it might have been said that the last policy had not attached, and that the premium must be returned, and such appears to have been the opinion of Chancellor *Walworth*, 14 Wend. 483. That decision did not extend the rule beyond a time policy on a trading voyage with this clause, for the return of premium, which is equivalent to several insurances, one on each of the separate passages. It is true that Mr. Justice *Story*, in Columbian Ins. Co. *v.* Catlett, 12 Wheat. 383, assumes that the amount of the prior policy remains the same, but this assumption is but an *obiter* expression of opinion. See the remarks of Mr. Senator *Tracy* on this point on page 506.

[1] Newby *v.* Reed, 1 W. Bl. 416; Godin *v.* Lond. Ass. Co., 1 Burr. 489, 492; Rogers *v.* Davis, 1 Beawes' Lex Mercatoria, 342, cited Marsh. Ins. 147, and Park on Ins. 374; Davis *v.* Gildart, id. 375; Thurston *v.* Koch, 4 Dall. 348; Craig *v.* Murgatroyd, 4 Yeates, 161; Cromie *v.* Kentucky & Louisville Mut. Ins. Co., 15 B. Mon. 432; Lucas *v.* Jeff. Ins. Co., 6 Cow. 635; Millaudon *v.* Western Mar. & F. Ins. Co., 9 La. 27. See Am. Ins. Co. *v.* Griswold, 14 Wend. 399, cited in the preceding note; Kemble *v.* Bowne, 1 Caines, 75. In France over-insurance is not permitted. Code de Com. a. 359. The effect of the late decision in Fisk *v.* Masterman, 8 M. & W. 165, may be to limit the application of this rule to cases in which all of the underwriters subscribed before the risk commenced.

[2] Craig *v.* Murgatroyd, 4 Yeates, 161.

all are liable, but *pro rata*.[1] They are held to be simultaneous, if, as is sometimes done, the policies so state; or if they bear date the same day, and there is no evidence of any difference in the time of their making.[2] But although dated and made on the same day, if they are not declared to be simultaneous, it may be shown by evidence that one was made before the other, and they are then not simultaneous.[3]

There is no double insurance, or over-insurance, unless all the policies insure the very same subject-matter, against the same risks,[4] and the whole amount insured exceeds the value of the whole subject-matter.[5]

So in a policy of reassurance there is no double assurance, unless the reassured himself has effected the reassurance.[6] Some policies provide that in case of any other insurance on the same

[1] Potter *v.* Mar. Ins. Co., 2 Mason, 475; Wiggin *v.* Suffolk Ins. Co., 18 Pick. 145.

[2] See cases in preceding note.

[3] Potter *v.* Marine Ins. Co., 2 Mason, 475; Brown *v.* Hartford Ins. Co., 3 Day, 58.

[4] Perkins *v.* N. E. Mar. Ins. Co., 12 Mass. 214; Columbian Ins. Co. *v.* Lynch, 11 Johns. 233; Stacey *v.* Franklin F. Ins. Co., 2 Watts & S. 506. See also, Peters *v.* Delaware Ins. Co., 5 S. & R. 473; Warder *v.* Horton, 4 Binn. 529.

[5] In Howard Ins. Co. *v.* Scribner, 5 Hill, 298, the action was upon a policy insuring $1,000 on *fixtures* and $3,000 on *stock*; there was another insurance of $5,000 on *stock and fixtures*. It was held, that the underwriter was liable as if there had been no other insurance. *Cowen*, J., in delivering the opinion of the court, said: "None of the numerous books cited show that the right to contribution has ever been supposed to arise without the subject-matter insured being exactly the same in each policy. It is not enough that the insured be the same. He may take policies on different things, on different risks pertaining to the same thing, or on different interests in respect to the same thing. In each case the demand for a loss against one insurer, is in no way affected by the subscription of another. (Godin *v.* Lond. Ass. Co., 1 Burr. 489, 495, 1 W. Bl. 103, 105; Park on Ins. 375.) We must here regard the first as in effect two separate policies, insuring $1,000 on the fixtures and $3,000 on the stock. Then, to warrant contribution, we want two other separate policies, or one insuring separate sums on each. The assured, however, took only one policy, insuring an entire sum on one parcel. The subject was, therefore, different. In the first it was separate, in the second, compound; and such a difference may as well be extended to fifty as to only two subjects. The several subjects are found to be substantially different, when an effort is made to effect contribution. The counsel for both parties agree, that in order to do so, the $5,000 must be divided into two parts, one being applied to the fixtures and the other to the stock. It is not denied that the division must be entirely arbitrary; and the different modes proposed by the parties best accord with their respective interests. Neither has cited any case where such a thing has been done, nor mentioned any principle by which we should be authorized thus to modify the contract of the parties." See 1 Phillips on Ins. sec. 366, where this decision is questioned.

[6] Mutual Safety Ins. Co. *v.* Hone, 2 Comst. 235.

property, the contract shall be null and void. But the obtaining a policy from another underwriter will not have this effect, if it be void for any cause, although it be on account of the fault of the insured, as by his misrepresentations.[1]

In one case where a party effected insurance, and the policy contained the clause, "warranted not to insure more than $11,000, and in case of any insurance over $11,000, the policy to be void," and the assured subsequently effected further insurance in two other offices, $5,000 in each, by policies containing this clause: "And it is hereby agreed that this policy shall become void, if any other insurance be made upon the vessel hereby assured, which, together with this insurance, shall exceed the sum of $10,000;" it was held, that the prohibitions contained in the last policies referred to subsequent and not to prior insurances, and that the last policies were valid, and the first was void, although the subsequent policies were not upon the entire interest covered by the first.[2] Policies which contain this clause usually provide that further insurance may be made, if assented to by the underwriter. And in such a case a parol consent would probably be sufficient, unless the contract provided that it should be in writing.[3]

If the policy contains a clause that in case of any other insur-

[1] Jackson v. Mass. Mut. F. Ins. Co., 23 Pick. 418; Stacey v. Franklin Fire Ins. Co., 2 Watts & S. 506. In Clark v. New England Mut. F. Ins. Co., 6 Cush. 342, this question was discussed at great length, and a subsequent policy, obtained by misrepresentations, was held to be utterly void, and not voidable merely at the option of insurers, and consequently the first policy was held to continue in force. See, *contra*, Carpenter v. Providence Washington Ins. Co., 16 Pet. 495. In Jackson v. Farmers' Mutual Fire Ins. Co., 5 Gray, 52, there was a provision in a policy that an increase of risk should render it void, and the court held that a subsequent policy, which provided that the existence of other insurance should discharge the underwriter, remained in force, the former policy being avoided by a change of risk.

[2] Mussey v. Atlas Mut. Ins. Co., 4 Kern. 79. The subsequent policies in this case also contained the usual clause in regard to prior insurance, which we have referred to at the commencement of this section; and the decision seems to have mainly proceeded on the ground that as prior insurances were already provided for, the words "other insurance" could refer only to subsequent insurance.

[3] Hale v. Mechanics' Mut. F. Ins. Co., 6 Gray, 169. The by-laws of the company in this case provided that any insurance subsequently obtained without the consent in writing of the president should avoid the policy. It was also provided, that the by-laws should in no case be altered except by a vote of two thirds of the stockholders or directors. It was held, under these circumstances, that a mere verbal consent of the president was not sufficient.

ance, whether prior or subsequent, the underwriters will not be liable beyond the proportion which the amount insured by them bears to the whole loss, and the assured warrants that the property is insured at another office to a stated amount, this warranty has been held to be complied with by the existence of such insurance at the time the policy was issued, and is not broken by the fact of the former policy being subsequently rendered void by the act of the assured.[1] If there be divers policies, and all of them do not exceed the value provable in some one of them or agreed upon in that, there is no over-insurance, or double insurance, as to that policy.[2]

On the other hand it has been said, that if the aggregate amount of the sums insured in all the policies exceeds the valuation of the subject in any one, it is over-insurance as to that; but this we think may be doubted.[3]

It may be added, that if the insurances are by different parties, on different interests, although on the same subject-matter, there is no double insurance.[4] But if three persons effect a joint insurance on a vessel, which is to be void in case of a subsequent over-insurance, the contract is at an end if any one of them effects a subsequent insurance.[5]

Every insurer has an insurable interest in the property which he insures; that is, he may secure to himself indemnity by insurance against the peril against which he insured the owner of the property. This is very commonly done by incorporated companies who wish to close their business and settle their

[1] Forbush *v.* Western Mass. Ins. Co., 4 Gray, 337. The prior policy in this case contained a clause that it should be annulled by any subsequent insurance obtained without the consent of the company. The plaintiff then effected insurance with the defendants, but did not inform the other insurers of it, in consequence of which, the policy signed by them became of no effect, and the court held, that the defendants were liable for the whole amount of the loss.

[2] Murray *v.* Ins. Co. of Penn., 2 Wash. C. C. 186; Kane *v.* Com. Ins. Co. of N. Y., 8 Johns. 229; Pleasants *v.* Maryland Ins. Co., 8 Cranch, 55; Minturn *v.* Col. Ins. Co., 10 Johns. 75. See M'Kim *v.* Phœnix Ins. Co., 2 Wash. C. C. 89.

[3] Bousfield *v.* Barnes, 4 Camp. 228; Kenny *v.* Clarkson, 1 Johns. 385. The doctrine, which is questioned in the text, is ably supported by Mr. Phillips, vol. 1, sec. 370, vol. 2, sec. 1191; but the weight of authority is opposed to it, and, we think, should be upon principle. See ante, p. 65, n. 1.

[4] Godin *v.* Roy. Exch. Ass. Co., 1 Burr. 489; Warder *v.* Horton, 4 Binn. 529.

[5] Mussey *v.* Atlas Mut. Ins. Co., 4 Kern. 79.

accounts, without the delay of waiting for the termination of every outstanding risk.[1] The reinsurers are entitled to make the same defence and the same objections which might be asserted by the original insurers in a suit on the same policy.[2] If the reinsured defends the case in the first instance, he is entitled to recover from the reinsurer the entire loss sustained by him, and all the costs and expenses which he has incurred, provided they are reasonable in their nature, unless there was no ground of defence, or the reinsurer did not sanction the contestation, either expressly or by implication.[3] It has been also held, that the reinsured is not bound to pay a loss before calling on the reinsurer, and that the latter is liable for the whole amount reinsured, although the first insurer is insolvent, and can pay but a percentage of the claim.[4]

Although, if reinsurance is effected by an agent without authority his act can be ratified, yet it must appear that it was the intention of the agent when the policy was effected, to cover the interest of the party seeking to adopt his act.[5]

[1] Reed *v.* Cole, 3 Burr. 1512; Union Mut. Ins. Co. *v.* Comm. Mut. Mar. Ins. Co., 2 Curtis, C. C. 524, 19 How. 318; Hastie *v.* De Peyster, 3 Caines, 190; Woodruff *v.* Columbus Ins. Co., 5 La. Ann. 697; Merry *v.* Prince, 2 Mass. 176; Oliver *v.* Greene, 3 Mass. 133. See also, Mercantile Mut. Ins. Co. *v.* State Mut. F. & M. Ins. Co. of Penn., 25 Barb. 319, cited ante, p. 58, n. 2. "Reinsurance is a valid contract at the common law. It is forbidden in England, except where the insurer shall be insolvent, become bankrupt, or die, by the statute 19 Geo. 2, c. 37, § 4." Per *Bronson*, J., New York Bowery F. Ins. Co *v.* New York F. Ins. Co., 17 Wend. 359, 362.

[2] New York Marine Ins. Co. *v.* Protection Ins. Co., 1 Story, 458.

[3] New York Marine Ins. Co. *v.* Protection Ins. Co., 1 Story, 458. See also, Hastie *v.* De Peyster, 3 Caines, 190.

[4] Hone *v.* Mutual Safety Ins. Co., 1 Sandf. 137, 2 Comst. 235.

[5] Alliance Mar. Ins. Co. *v.* La. State Ins. Co., 8 La. 1. In this case goods were insured in England on a voyage at and from New Orleans to Liverpool. The ship, after sailing, put back to New Orleans, and it became necessary to take out and store the cargo. The consignee of the vessel, not knowing of the insurance in England, procured the cargo to be insured against fire while on land for the benefit of whom it might concern. A loss by fire having taken place, the English company paid it and sought to recover from the New Orleans company, on the ground that it was a reinsurance, but the court held the action could not be maintained.

CHAPTER III.

OF WARRANTIES.

SECTION I.

OF EXPRESS WARRANTIES.

THESE are stipulations or promises of the assured, in the policy, that certain things exist or shall exist, or have been, or shall be done. It is to be noticed that these are warranties; and this circumstance, on the general principles of the law of contracts, excludes many inquiries which might otherwise be made. Thus, the warranty is equally binding, and a breach of it equally fatal, whether the thing warranted be material or immaterial.[1] Nor is it any legal excuse for the breach, or any protection against its consequences, that it was not intended by the insured, and cannot be imputed either to his design or his fault; and the acts of all employed by him or of any other person, if they violate the warranty, are equivalent to a breach of it by himself. Because the question is not by whose agency is the warranty broken, but whether it be broken, for that avoids the contract.[2] And it must be not only substantially but strictly complied with; "nothing tantamount will do," says Lord Mansfield.[3] But that will be a sufficiently strict and literal compli-

[1] Blackhurst *v.* Cockell, 3 T. R. 360, per *Buller, J.*; Newcastle F. Ins. Co. *v.* Macmorran, 3 Dow, 255, 262.

[2] Duncan *v.* Sun F. Ins. Co., 6 Wend. 488.

[3] Pawson *v.* Watson, Cowp. 785. In De Hahn *v.* Hartley, 1 T. R. 343, 2 T. R. 186, the ship was warranted to sail "from Liverpool with fourteen six-pounders, swivels, small arms, and fifty hands or upwards." She had only forty-six men on board, when she sailed from Liverpool, but took six more at the Isle of Anglesea, only

ance or performance, which is so if the warranty is construed and interpreted according to usage and the actual intention of the parties.[1] And sometimes this strict compliance operates in favor of the assured. A question has arisen, where different subjects are insured by the same policy, whether the contract is an entirety to such an extent that a false warranty as to one subject would render the whole contract a nullity. We give in the notes the result of adjudication upon this subject.[2]

six hours afterwards. The loss was in no way owing to the deficiency. Held, that the policy was void. Lord *Mansfield* said: "A warranty in a policy of insurance is a condition or a contingency, and unless that be performed, there is no contract. It is perfectly immaterial for what purpose a warranty is introduced; but, being inserted, the contract does not exist, unless it be literally complied with." In Sawyer *v.* Coasters' Mutual Ins. Co., 6 Gray, 221, a vessel was insured for one year from the 21st of September, 1847. The vessel sailed from New York on the 21st of August, 1847, with grain in bulk bound to Ballisidore in Ireland, and on the 24th and 25th of September, while entering the harbor, received the injuries complained of. The policy contained the clause: "Said vessel not allowed to carry grain in bulk across the Atlantic." It was contended, on the part of the plaintiffs, that the warranty was to be construed literally, and that when the policy was effected the vessel was entering the harbor, and did not afterwards cross the Atlantic with grain in bulk. But the court held that the policy did not insure the vessel if laden with grain in bulk, on a voyage across the Atlantic, and that at the time of the loss, she was carrying grain in bulk on such a voyage.

[1] In Bean *v.* Stupart, 1 Doug. 11, the ship was warranted to have "thirty seamen, besides passengers." The word seamen was held to include "the steward, cook, surgeon, some boys, and apprentices."

[2] In Smith *v.* Empire Ins. Co., 25 Barb. 497, it was held that where the same policy insures a house and furniture, although at a separate valuation, and the policy is void as to the building by reason of a false warranty as to incumbrances thereon, it is void as to the furniture also, although there is no incumbrance on the furniture. This case overrules Trench *v.* Chenango Co. Mut. Ins. Co., 7 Hill, 122, which case was also doubted in Wilson *v.* Herkimer Co. Mut. Ins. Co., 2 Seld. 53. In Clark *v.* New England Mut. Fire Ins. Co., 6 Cush. 342, two buildings were separately insured at a separate valuation in the same policy. One of the buildings was alienated by the insured, and it was contended that this avoided the policy as to both. *Fletcher*, J., said: "But the shop was valued separately, and was insured separately, as a separate, distinct, independent subject of insurance, though insured in the same policy. The alienation of the shop would no doubt avoid the policy *pro tanto*, and only *pro tanto*. The tavern-house and the shop being insured separately, the alienation of one would no more affect the insurance on the other, than if they had been insured in separate policies." In Brown *v.* People's Mut. Ins. Co., 11 Cush. 280, real and personal estate were insured at a separate valuation in the same policy. One premium note for the whole insurance was given, and the policy secured a lien on the whole property insured to secure the payment of assessments. The real estate was incumbered by a mortgage, which was not disclosed to the insurers, and it was held that the policy was void as to

A warranty must be a part of the policy; and may be written upon any part of it, but not upon other papers or documents, unless it is expressly referred to as a warranty in the policy.[1] And any explicit allegation or assertion of a part may be sufficient as a warranty thereof. As, for example, where a vessel is described as the "good American ship called the Rodman," this is a warranty that the ship is American.[2] And a statement that a vessel was in port on a certain day has been held to be a warranty of that fact.[3] It has been also held that a statement that "the goods belong to the plaintiffs, American citizens," is a warranty of their neutrality, and not a statement merely.[4] In one case the insurance was stated to be for the account of M. Mackay, Jr., of Boston. This was considered as equivalent to a warranty that he was owner, and as he was known to the parties as an American residing in Boston, it was held to be a warranty that the property was American.[5] But the statement must be direct, and not collateral. As where a vessel is stated to be called the American ship President, this is no warranty that she is an American vessel.[6] Nor is the calling a vessel by an English name a warranty that she is English.[7] Nor a stipulation that the insurers are not to be liable for damage to or from the sheathing of a vessel, a warranty that she is sheathed.[8]

the whole amount insured. The court said: "The contract being entire, and one premium note being given, the lien for the security of the same was affected by the misstatement."

[1] Bean *v.* Stupart, 1 Doug. 11; Kenyon *v.* Berthon, 1 Doug. 12, note, where it is held that a statement is not a warranty unless written upon the policy. See also, Jennings *v.* Chenango Co. Mut. Ins. Co., 2 Denio, 75; Glendale Woolen Co. *v.* Protection Ins. Co., 21 Conn. 19; Routledge *v.* Burrell, 1 H. Bl. 254; Williams *v.* New Eng. Mut. F. Ins. Co., 31 Maine, 219. See also ante, p. 51, 52.

[2] Barker *v.* Phœnix Ins. Co., 8 Johns. 307; Atherton *v.* Brown, 14 Mass. 152; Higgins *v.* Livermore, 14 Mass. 106; Lewis *v.* Thatcher, 15 Mass. 431; Francis *v.* Ocean Ins. Co., 6 Cow. 404; Vandenheuvel *v.* United Ins. Co., 2 Johns. Cas. 127; Goix *v.* Low, 1 Johns. Cas. 341; Murray *v.* United Ins. Co., 2 id. 168; Vandenheuvel *v.* Church, 2 id. 173, note.

[3] Kenyon *v.* Berthon, 1 Doug. 12, note.

[4] Walton *v.* Bethune, 2 Brev. 453.

[5] Kemble *v.* Rhinelander, 3 Johns. Cas. 130.

[6] Le Mesurier *v.* Vaughan, 6 East, 382.

[7] Clapham *v.* Cologan, 3 Camp. 382.

[8] Martin *v.* Fishing Ins. Co., 20 Pick. 389.

Nor is the description of the risk "at and from New York to the port of Sisal," a warranty that there is any port at Sisal.[1] And the calling the vessel in the policy "the good ship A," is no warranty of her sea-worthiness.[2] It has been held in Louisiana, in a case where a vessel had sustained an injury, and insurance was effected "on condition that the damage done (mentioning it) be repaired, and the vessel be put in as good order as she was previous to that accident," that her being repaired was not a condition precedent to the attaching of the policy, but meant that the insured should repair the vessel before she was exposed to the perils of the sea.[3] We must, however, express our doubts of the correctness of this decision. And if the recital of a fact could have no relation whatever to the risk, it would seem not to be a warranty, but merely a representation.[4] It has been held, that a non-compliance with the exact requirement of a warranty, at the commencement of a risk, avoids the policy, although afterwards and before loss it is complied with, and all the other risks are wholly distinct from that to which the warranty related,[5] even if the breach is caused by one of the perils against which there is insurance.[6]

[1] De Longuemere *v.* N. Y. Firem. Ins. Co., 10 Johns. 120. And in Muller *v.* Thompson, 2 Camp. 610, where the insurance was declared to be "on the cargo, being 1,031 hogsheads of wine," it was held that this did not amount to a warranty that the whole cargo consisted of wine, but merely that the insurance should attach upon that part of the cargo which consisted of the 1,031 hogsheads of wine.

[2] Small *v.* Gibson, 16 Q. B. 141, 3 Eng. L. & Eq. 299, 305.

[3] Hyde *v.* Miss. M. & F. Ins. Co., 10 La. 543. While the vessel was being repaired, the river rose, accompanied by a storm, and the vessel sunk. The underwriters were held liable for a total loss.

[4] Mackie *v.* Pleasants, 2 Binn. 363. The insurance in this case was effected on "the good British brig called The John." The vessel was insured at the regular sea risk premium, and there was a written memorandum at the foot of the policy, that the insurance was to be against perils of the sea only, and was to end on capture. The vessel was not duly registered as a British brig, but there was evidence that her captain was a subject of Great Britain. It was also shown to be the custom in Philadelphia to insert all special warranties in a separate clause, and that this did not contain any warranty of nationality. It was held on all these facts, that the vessel having been lost by a peril of the sea, the plaintiff was entitled to recover. The fact that the nationality of the vessel was not stated in the usual warranty clause, was considered as of great weight in determining the intention of the parties, although it was held that a warranty could be in any part of the policy.

[5] Rich *v.* Parker, 7 T. R. 705, 2 Esp. 615; Goicoechea *v.* La. State Ins. Co., 18 Mart. La. 51.

[6] Hore *v.* Whitmore, 2 Cowp. 784. In 1 Phillips on Ins. § 770, the rule is otherwise

If the warranty is of a fact that is not to occur until after the commencement of the risk, and the loss occur before the warranty is complied with, it is no breach which discharges the insurers,[1] nor is it such a breach, if a compliance with the warranty was legal when it was made, but becomes illegal afterwards; for the law never requires that an illegal act should be done.[2]

The usual subjects of express warranty, are ownership of the property, its neutrality, and the lawfulness of the goods or adventure, the taking of convoy, and the time of sailing; and we will consider them in their order.

A. *Of the Warranty of Ownership.*

The insurers have, as has been said, the right of personal selection, as it is obvious that property would be far safer if owned and controlled by some persons than if owned by others. But, generally, if they wish to secure any advantage of this kind, there must be express warranty of the ownership; for as we have seen, the owner need not be named; but, as we have also seen, he cannot be changed by assignment or transfer, without the consent of the insurers.[3]

stated, and Havelock *v.* Hancill, 3 T. R. 277, and Cruikshank *v.* Jansen, 2 Taunt. 301, are cited. But those cases, as explained by the courts deciding them, do not seem to conflict with the above case of Hore *v.* Whitmore, in which the doctrine laid down in the text is expressly sustained. See 1 Arnould on Ins. 584.

[1] Hendricks *v.* Com. Ins. Co., 8 Johns. 1; Taylor *v.* Lowell, 3 Mass. 331, 347; Baines *v.* Holland, 10 Exch. 801, 32 Eng. L. & Eq. 503; 1 Phillips on Ins. § 771. Mr. Arnould questions this doctrine, and contends that it was competent for the parties to contract that the policy "should be void *in toto*, as well upon the non-performance of some promised act, as upon the non-existence of some alleged event," and says it seems to him that they must be taken to have done so. But it is clear that if a total loss should happen before the time at which the warranty is to be complied with, the insurer would have no defence, even if he could show that the insured intended not to comply with it. This must have been in the contemplation of the parties, and seems to show that they could not have intended to make the contract void *ab initio* in case of a non-compliance with the warranty. See 1 Arnould on Ins. 583.

[2] Brewster *v.* Kitchell, 1 Salk. 198, 1 Ld. Raym. 317.

[3] See ante, p. 45.

B. *Of the Warranty of Neutrality.*

The most usual cause of requiring a warranty of ownership, occurs where this is done in order to make it certain that the property is neutral, or at least to prevent the underwriters from assuming any risk arising from the belligerent character of the property. A warranty that the property is "English" or "French," means that it is owned by Englishmen or Frenchmen, and has the proper proof and evidence of such ownership.[1] To determine to what nation a person belongs, regard must be had to the question of domicil. Thus, as we have already seen, if an American is residing in England and engaged in trade there, he is as to that trade considered as an Englishman,[2] and if he insures goods, and warrants them to be American property, the underwriters are not liable for a loss by capture.[3] A colony partakes of the nationality of its parent country, so that the produce of an estate in a colony of a belligerent power, owned by a neutral, is considered as belligerent.[4] But it seems that if the property is once landed in a neutral country, or brought there in vessels, and then removed from those vessels to others in which it is to be exported, it is considered as neutral.[5] But if the importation is only colorable, and the intention of the importer is to transship and export the goods, their original character remains.[6]

These questions have grown out of a rule of law which appears to be well-established by the English courts, though it

[1] Baring *v.* Clagett, 3 B. & P. 201; Lewis *v.* Thatcher, 15 Mass. 431.

[2] See ante, p. 12, n. 1.

[3] Tabbs *v.* Bendelack, 4 Esp. 108.

[4] The Maastrom, cited 5 Rob. Adm. 21; The Juffrow Catharina, cited id. 21; The Phœnix, id. 20.

[5] Berens *v.* Rucker, 1 W. Bl. 313. In The Polly, 2 Rob. Adm. 361, an American vessel was captured on a voyage from a port in Massachusetts to Spain, with a cargo consisting partly of the produce of a Spanish colony. The goods had been imported from Havana in the same vessel, for the same owners, and had been landed in the United States, while the ship was being repaired, and duties paid on them. Sir *William Scott* held, that although the landing of the goods and the payment of duties on them might not be universally the test of a *bonâ fide* importation, yet that they were generally the criteria, and a restoration of the vessel was ordered.

[6] The Essex, cited 5 Rob. Adm. 369; The William, id. 385; The Maria, id. 365.

has never been recognized in this country, but on the contrary, strongly repudiated, and which, it seems to us, is in direct conflict with every principle of the law of nations. This rule is, that a country which, during peace, confines the trade of its colonies to its own subjects, cannot, during war, open such trade to a neutral.[1]

[1] This subject has been so elaborately discussed by the jurists of this country and England, that were we to attempt a full consideration of the question, we should only be able to repeat what has been before said, and we shall, therefore, confine ourselves to a brief statement of the origin of the rule, and the reasons which have been urged in its support, and against it. This rule is generally known by the name of the rule of 1756, because many vessels were then condemned for engaging in the colonial trade of France, but Mr. *Duer* contends that these cases were decided on a different ground from the subsequent authorities. See 1 Duer, Ins. 705. But the rule was acted on by Lord *Stowell*, as is stated in 1 Arnould, Ins. p. 629, from the year 1792 to 1815, and is firmly established in England. Mr. *Arnould* states that the rule rests on two grounds: "1. That the neutral, by thus acting, interposes to relieve the enemy from the condition to which the other belligerent had reduced him, and to that extent deprives that belligerent of the advantage he had gained; 2. That the neutral employed in a trade reserved by the enemy to his own subjects, identifies himself with that enemy, and assumes his character." To these reasons another has been added, that as the neutral nations are permitted to enjoy the whole of the trade to which they were entitled in time of peace, they can sustain no injury by their exclusion from that which is first opened to them in time of war. See 1 Duer, Ins. 706.

The objections to the rule are, that it is not founded on the law of nations, but is a most unwarrantable extension of the law of blockade "at utter variance with the principle on which the law of blockade is certainly founded," it being a well-settled principle of law that a neutral has a right to trade with a belligerent except in contraband goods, and to a blockaded port. The last reason for the rule is open to the objection that it has no foundation in point of fact. If a neutral had, in time of war, the same rights which he has in time of peace, there would be an apparent equity for the rule, but in time of war he is entirely cut off from all trade in contraband articles, and to blockaded ports. In support of the English rule, see The Ebenezer, 6 Rob. Adm. 250; The Emmanuel, 1 id. 296; The Immanuel, 2 id. 186, 200; The Rebecca, id. 101; The Minerva, 3 id. 229; The Jonge Thomas, id. 233, note; The Charlotte, 4 id. Appendix, p. 13; The Welvaart, 1 id. 122; The Providentia, 2 id. 142; The Calypso, id. 154; The Rosalie & Betty, 4 id. Appendix A. p. 3, n.; The Juliana, 4 id. 328; The Convenientia, id. 201; The Anna Catharina, id. 107; The Thomyris, Edw. 17; Lord Liverpool's "Discourse on the conduct of the government of Great Britain," etc.; Ward "On the rights and duties of belligerents and neutrals;" Stephens' "War in disguise."

The rule has been repudiated by the government of this country on the ground that neutrals are entitled "to trade, with the exception of blockades and contrabands, to and between all ports of the enemy, and in all articles, although the trade should not have been opened to them in time of peace." Mr. Monroe's letter to Lord Mulgrave, September 23, 1805, and Mr. Madison's letter to Messrs. Monroe & Pinckney, May 17, 1806. See also, the memorials of the merchants of Baltimore, New York, Boston, and Salem, 5 American State Papers, 330–355, 367–379. The Baltimore memorial

If the property is warranted to be of a certain country, at a time when that country is known to be at peace, this may be regarded as equivalent to a warranty of neutrality. And a warranty that the ship or the cargo is neutral, or neutral property, means, first, that it is actually owned by citizens of a country not at war when the risk begins; and, secondly, that with the property there shall go all those usual documents and precautions which prove the neutrality of the property and protect it from belligerent risks. But a declaration of war, made after the policy is made, although it may render the property belligerent, does not avoid the policy.[1]

If the neutral or national character of the property be not expressly warranted, but some fact is warranted, or so asserted as to amount to a warranty, and this fact, if true, would necessarily imply the neutrality of the property, then that neutrality is warranted.[2] It seems to be well settled that "whoever embarks his property in shares of a ship is bound by the character of that ship." If, therefore, a neutral owns part of a vessel, though it is purchased and held before the war, and the rest of the vessel is owned by belligerents, the whole vessel is subject to condemnation.[3] And it would, therefore, follow that a warranty of neutrality would be broken if a belligerent owned any part of the vessel.

In regard to goods, the rule is different,[4] and the warranty of neutrality is held to extend only to the interest of the assured, and is not broken by the fact that a part of the cargo not insured is not neutral.[5] But if the warranty is by an insured, whose interest covers the whole, the belligerent character of any part would render the whole liable to condemnation;[6] and so it should be if in an

was drawn by Mr. Pinckney. We must also call the attention of the reader to the learned and elaborate essay by Mr. Justice *Duer*, to which we are much indebted for a clear and accurate statement of the law on this subject. 1 Duer, Ins. 698–725.

[1] Eden *v.* Parkison, 2 Doug. 732; Salloucci *v.* Johnson, Park on Ins. 449, per *Buller*, J. See also, Tyson *v.* Gurney, 3 T. R. 477.

[2] See ante, p. 106, and cases cited.

[3] The Vrow Elizabeth, 5 Rob. Adm. 2; The Primus, 1 Spink, Adm. 353, 29 Eng. L. & Eq. 589; The Industrie, 1 Spink, Adm. 444, 33 Eng. L. & Eq. 572.

[4] The Vreede Scholtys, 5 Rob. Adm. 5, note; The Primus, *supra*.

[5] Livingston *v.* Maryland Ins. Co., 6 Cranch, 274; Barker *v.* Blakes, 9 East, 283.

[6] Goold *v.* United Ins. Co., 2 Caines, 73; Murray *v.* United Ins. Co., 2 Johns. Cas. 168; Bayard *v.* Mass. F. & M. Ins. Co., 4 Mason, 256. In Calbreath *v.* Gracy, 1 Wash. C. C. 219, it was held, that if property is warranted neutral and the insured is owner

insurance of any part there were an express warranty that the whole cargo was neutral. The law looks at the equitable or beneficial interest in determining this question; and, therefore, property held by a neutral by a legal title, but in trust and for the benefit of a belligerent, is belligerent property.[1] And it has been held, that goods sold to a belligerent and to be delivered to him in his own country, are belligerent during their transit;[2] but it would oppose the general principles of the law of contract, to give this character to the property if the sale were not completed and the property transferred so as to be at the risk of the belligerent, who had paid, or was bound at all events for the price.[3]

If neutral goods are shipped, in time of peace, to a consignee who has not ordered them, so that the property would not vest in him till the goods were received, in case of capture they are considered as the property of the consignor.[4] But if they are shipped by a neutral after the war begins, and under a contract made during peace, but in contemplation of war, and to be at the risk of the sender until delivery, they are put on the same footing as if the contract were made during war.[5]

of one third, yet if he is joint owner with others of the whole, this is a warranty of the neutrality of the whole, but otherwise if the other persons have only a colorable interest.

[1] Murray *v.* United Ins. Co., 2 Johns. Cas. 168. See also, The Abo, 1 Spink, Adm. 347, 29 Eng. L. & Eq. 591.

[2] The Atlas, 3 Rob. Adm. 299; The Sally, cited 3 id. 300; The Anna Catharina, 4 id. 107; The Jan Frederick, 5 id. 127. See also, The Ann Green, 1 Gallis. 274; The Francis, 1 Gallis. 445; 1 Kent's Com. 86; 1 Duer on Ins. 423, et seq.

[3] The principle laid down in the decisions cited in the preceding note was opposed with great force in DeWolf *v.* N. Y. Firem. Ins. Co., 20 Johns. 214, 2 Cowen, 56. The objection, as stated by *Spencer*, C. J., is substantially this: As the property in goods on their way to a belligerent to be delivered to him in his country does not pass under the contract of sale until the delivery, the principle of the above cases would expose all property bound to an enemy's country to capture and condemnation, and thus overthrow the general principle that trade between neutrals and belligerents, except in contraband goods, is lawful. See also, Ludlow *v.* Bowne, 1 Johns. 1.

[4] The Abo, 1 Spink, Adm. 347, 29 Eng. L. & Eq. 591.

[5] The Packet De Bilboa, 2 Rob. Adm. 133, 135, per Sir *William Scott*. "A distinction has, indeed, been admitted in favor of contracts made before a war and without any contemplation of it; but if the contract, being made before the war, and without any prospect thereto, is carried into execution by a shipment after the breaking out of hostilities, the ground on which that favorable distinction is made no longer exists." Per Sir *William Scott*, The Anna Catharina, 4 Rob. Adm. 107, 112.

If a subject of a belligerent power ships goods to a neutral, which have not been ordered by him, so that the belligerent retains the control over them, they are considered as his property.[1] The general rule is, that belligerent property cannot change its character while *in transitu*,[2] so that if by the agreement between the vendor and the vendee the goods were to become the property of the latter on the performance of a condition, it would seem that although this was complied with before capture, it would not affect the rights of the captors to consider the goods as belligerent.[3]

The mere right of a belligerent seller to stop the goods *in transitu*, on the insolvency of the vendee, is not such an interest in him as would make the goods belligerent.[4]

A neutral shipper, becoming belligerent by subsequent war, cannot protect the goods by transfer to a neutral for that purpose.[5] And if a neutral transfer a part of the property to a bel-

[1] The Carolina, 1 Rob. Adm. 305; The Josephine, 4 Rob. Adm. 25; The Aurora, id. 218; The Frances, 8 Cranch, 359. In The Francis, 1 Gallis. 445, the shipment was to belong to the neutral at his election, in twenty-four hours after arrival. It was held that the property was to be considered as hostile.

[2] In The Negotie en Zeevaart, cited 1 Rob. Adm. 111, and in The Danckebaar Africaan, 1 Rob. Adm. 107, it was held that where property was hostile when shipped, it could not change its character while *in transitu*, although before capture the owners had become by capitulation subjects of the capturing power.

[3] In The Ship Francis, 1 Gallis. 445, the goods were to become the property of the consignee at his election in twenty-four hours after arrival. The claimants moved for further proof by which they could show that they had made their election before the capture. Mr. Justice *Story* refused to grant the order for further proof, mainly on the ground that it would constitute no legal defence, on the authority of the cases cited in the preceding note.

[4] See The Merrimack, 8 Cranch, 317. Some confusion has arisen from the twofold meaning of the words *stoppage in transitu*. The one is the right of the vendor, when he consigns goods to a party who has not ordered them, to take possession of them at any time, and the other is the right of the vendor, to take the goods before the vendee obtains possession of them, although the sale is absolute in its terms, if the vendee has become insolvent. In the former case the character of the goods does not change till delivery, as we have already seen, while in the latter the property vests in the vendee, subject to the exercise of this right, which is, as we think, but an extension of his lien for the price, and does not act as a rescission of the contract. See Vol. 1, p. 339.

[5] The Vrow Margaretha, 1 Rob. Adm. 336; The Carl Walter, 4 id. 207. So a contract made by a neutral, in anticipation of his becoming belligerent, to transfer property *in transitu*, if for the purpose of withdrawing it from capture, will not protect it. The Jan Frederick, 5 Rob. Adm. 127.

ligerent so that this part loses its neutral character, it is a breach of the warranty of neutrality as to the whole property.[1]

The general rule is, that if a neutral cargo is shipped on board a belligerent vessel before war is declared, the bill of lading need not state for whose account and risk the property was shipped, but the law is otherwise if it is put on board after war is declared.[2]

The bill of sale of the ship, the sea-letter, or customary certificate of nationality, the register of the vessel, the charter-party, shipping papers and roll of equipage, the log-book, and generally all documents which usually state the national character, and especially the flag, must all conform to this warranted neutrality of the ship.[3] Upon this point the law goes so far as to hold that if the vessel exhibits only false papers when she is captured,

[1] Goold *v.* United Ins. Co., 2 Caines, 73.

[2] The Abo, 1 Spink, Adm. 347, 29 Eng. L. & Eq. 591.

[3] No rule can be laid down as to the precise amount of evidence required. In Barker *v.* Phœnix Ins. Co., 8 Johns. 307, the want of a register was not in itself considered a breach of the warranty of neutrality, a sea-letter being held sufficient evidence of national character. The opinion of Lord *Alvanley* to the contrary in Baring *v.* Clagett, 3 B. & P. 201, was founded on the idea that an unregistered vessel was not considered as an American vessel under the Act of Congress of 1792. This decision was given in 1802, but subsequent legislation recognizes vessels owned wholly by citizens of the United States and furnished with sea-letters, as entitled to protection as American vessels. See Act of 1810, ante, vol. 1, p. 565; Griffith *v.* Ins. Co. of N. A., 5 Binn. 464; Blagge *v.* N. Y. Ins. Co., 1 Caines, 549; Coolidge *v.* N. Y. Firemen's Ins., 14 Johns. 308; The San Jose Indiano, 2 Gallis. 268, 285. The importance of having papers conform to the warranty of neutrality may be gathered from the following statement of the law by Sir *W. Scott*, in The Success, 1 Dods. 131, 132: "Now it is a known rule of law, that when parties agree to take the flag and pass of another country, they are not permitted, in case any inconvenience should afterwards arise, to aver against the flag and pass to which they have attached themselves, and to claim the benefit of their real character. They are likewise subject to this further inconvenience, that their own real character may be pleaded against them by others." See The Vigilantia, 1 Rob. Adm. 1; The Vrow Elizabeth, 5 Rob. Adm. 2, and n.; The Vreede Scholtys, 5 Rob. Adm. 5, n.; Higgins *v.* Livermore, 14 Mass. 106; Schwartz *v.* Ins. Co. of N. A., 3 Wash. C. C. 117. In a time of peace the registry seems to be sufficient to comply with the warranty of neutrality. Catlett *v.* Pacific Ins. Co., 1 Paine, C. C. 594. Compliance with the law of nations is generally sufficient, and it is not necessary to observe an ordinance of a belligerent power, especially when it is not known to the neutral. Siffken *v.* Lee, 5 B. & P. 484. See also, Barzillay *v.* Lewis, Park on Ins. 469. What is meant by a sea-letter may be shown by parol. Sleght *v.* Hartshorne, 2 Johns. 531, overruling same case in Supreme Court, Sleght *v.* Rhinelander, 1 Johns. 192.

this is a breach of the warranty of neutrality, though she have on board the proper American papers, and have a right to carry the false papers; because she must not only have proper papers, but use them in a proper time and in a proper way.[1] As to the goods, their neutral national character must be proved by the invoices and bills of lading, and by all certificates, letters, or other documents relating to the goods, which are in themselves proper, or are made so by usage.[2]

It seems that simulated or false papers may not only be carried when leave is expressly given, but when a usage exists to carry them which is, or should be known to the insurer.[3] But, in one case, the concealment of papers was declared to be a breach of the warranty, and the having on board papers written in sympathetic ink and thereby rendered suspicious, was held to be equivalent to a concealment of material papers.[4] If a party, in time of peace, for the sake of avoiding certain duties or the like, assumes a false character, he is not concluded by such assumption, in case of a war breaking out, from showing the true character and nature of the goods.[5]

As a general rule, it is a sufficient compliance with a warranty of neutrality, if the vessel is neutral according to the law of nations, and if she is captured and condemned for the breach of an ordinance of the capturing power, which was contrary to the

[1] Calbreath *v.* Gracy, 1 Wash. C. C. 219.

[2] Griffith *v.* Ins. Co. of N. A., 5 Binn. 464.

[3] Livingston *v.* Maryland Ins. Co., 7 Cranch, 506, per *Marshall*, C. J.; Calbreath *v.* Gracy, 1 Wash. C. C. 219, per *Washington*, J. But generally the concealment of papers amounts to a breach of warranty. Livingston *v.* Maryland Ins. Co., 7 Cranch, 506. See Oswell *v.* Vigne, 15 East, 70; Horneyer *v.* Lushington, 15 East, 46; Steel *v.* Lacy, 3 Taunt. 285. In Himely *v.* Stewart, 1 Brev. 209, it was held, that where goods insured are masked to avoid capture, the mask must be preserved, and if the master of the vessel in which they are laden has agreed with the insured to protect them by claiming them as his own, he is the agent of the insured for that purpose, and is bound to take every necessary measure and to use every precaution consistent with his duty to preserve the property, and if the goods are lost by his failure to do so, the insurer will not be liable; nor will he if the insured send papers by the same vessel the goods are in, which lead to a discovery of the contrivance, and enable the captors to unmask the property.

[4] Carrere *v.* Union Ins. Co., 3 Harris & J. 324; Schwartz *v.* Ins. Co. of N. A., 3 Wash. C. C. 117.

[5] The Vreede Scholtys, 5 Rob. Adm. 5, note.

law of nations and of which neither party had notice, the underwriters are liable.[1]

While a ship is forfeited by the master's disguising belligerent property on board as neutral, without the authority, assent, or knowledge of the owner, the forfeiture of neutrality by owner or master or both does not operate as a breach of neutrality as to goods on board which are actually neutral, and proved to be so by proper documents, and belong to another owner than him who has forfeited his goods.[2]

As the warranty of neutrality of property requires actual neutral ownership, and proper proof of this, so it requires such trade, conduct, and course of transaction as shall be in conformity and adaptation to this warranty. And, therefore, if the neutral interests or property are undistinguishably mixed up with belligerent interests or property, they become liable themselves to all the incidents and effects of a belligerent character.[3]

So a resistance of a search when rightfully demanded,[4] an attempt at rescue,[5] seeking belligerent protection or receiving it,[6]

[1] Mayne v. Walter, 3 Doug. 79.

[2] The mere fact of there being belligerent property on board a neutral vessel will not be a breach of the warranty of neutrality of the vessel. "But if the neutral endeavors, by false appearances, to cover the property of a belligerent from the lawful seizure of his enemy, such conduct identifies the neutral with the belligerent, whom he thus endeavors to protect, and the increase of risk by being carried in for adjudication is produced, not by a legal act, as in the former case, but by a fraud on the neutrality of his own government, and upon the rights of the belligerent. The warranty of neutrality is broken by unneutral conduct in the insured." Schwartz v. Ins. Co. of N. A., 3 Wash. C. C. 117; The Fortuna, 3 Wheat. 236, 245. If the master, as general agent of a neutral cargo, belonging to him and other persons, covers belligerent property on board as neutral, this works a forfeiture of the property of his principals, although it is done without their knowledge, and although their property can plainly be distinguished from the covered property by the bills of lading and the invoices on board. Phœnix Ins. Co. v. Pratt, 2 Binn. 308, reversing same case at *nisi prius*, Pratt v. Phœnix Ins. Co., 1 Browne, 152. But it is evident that the character of the cargo on board belonging to other shippers would not be affected; for even if the ship is belligerent it may be shown that the cargo is neutral. See ante, p. 111, n. 4.

[3] The Princessa, 2 Rob. Adm. 49.

[4] The Maria, 1 Rob. Adm. 340, 360; Garrels v. Kensington, 8 T. R. 230; Snowden v. Phœnix Ins. Co., 3 Binn. 457, 468; Brown v. Union Ins. Co., 5 Day, 1. See, *contra*, Salaucci v. Johnson, Park, Ins. 498. This right of search does not exist in time of peace. The Mariana Flora, 11 Wheat. 1.

[5] Garrels v. Kensington, 8 T. R. 230; M'Lellan v. Maine F. & M. Ins. Co., 12 Mass. 246; Robinson v. Jones, 8 Mass. 536; Brown v. Union Ins. Co., 5 Day, 1.

[6] As where she sails under a belligerent convoy, or one of her own nation. The

are all breaches of the warranty of neutrality, because they belong to the conduct of a belligerent; but it is said, in qualification of this rule, that if any of these or similar things are done because a belligerent renders them necessary by his own illegal conduct, they are justifiable, and do not violate the warranty of neutrality.[1]

But if the captors do not put on board persons competent to navigate the vessel into port for adjudication, her own master and crew are not bound to do this. And if the vessel is given up to them, and they pursue their original course against the wish of the captors, this is not a rescue.[2] But if the neutral crew undertake and promise to navigate the vessel to the destined port for adjudication, and the vessel is given up to them for this purpose, and they violate their promise and take the vessel into their own hands for their own purposes and benefit, this is an unlawful rescue.[3]

Any acts in respect to neutral property, which have for their purpose the preventing of a belligerent from exercising the right he has over neutral property as such, generally give to the belligerent whom it is endeavored thus to obstruct or deceive, the right of treating the property as belligerent; even to the extent of condemning the property whether ship or cargo, mixed up with it and implicated in the same wrongful purpose.[4]

Maria, 1 Rob. Adm. 340; The Joseph, 1 Gallis. 545, 548; The Sampson, cited 1 Rob. Adm. 346. In The Julia, 1 Gallis. 594, 8 Cranch, 181, it was held, that a license from the enemy, on board an American vessel on a voyage to a neutral port in alliance with the enemy, would subject the vessel and cargo to confiscation as prize of war, if the terms of the license were such as to prove an intercourse with the enemy and a direct subserviency to his interests. And the court were also strongly inclined to the opinion that a license, without any such peculiar terms, would have the same effect. If, however, the belligerent, against whom such convoy is taken, puts the neutral in a state of outlawry without just cause, as where a decree of the French emperor made every ship which had been visited by an English vessel liable to capture, then convoy may be taken. Snowden *v.* Phœnix Ins. Co., 3 Binn. 457. The following illustration is given by the court: "Suppose France had declared war against the United States after the commencement of the voyage, might not the captain have put himself under British convoy without breach of the warranty?"

[1] M'Lellan *v.* Maine Fire & Mar. Ins. Co., 12 Mass. 246. See also, Snowden *v.* Phœnix Ins. Co., 3 Binn. 457, note *supra*.

[2] The Pennsylvania, 1 Act. 33.

[3] Wilcocks *v.* Union Ins. Co., 2 Binn. 574.

[4] The Eliza & Katy, 6 Rob. Adm. 185; The Fanny, 1 Dods. 443; Blagge *v.* New York Ins. Co., 1 Caines, 549.

It is to be noticed, however, that the ship and the cargo are so far distinct, that neutral goods may be put on board a belligerent ship without being liable to be made prize of war; and that if the ship be neutral, it is no breach of the warranty of her neutrality, that she takes on board and carries belligerent goods.[1]

The law of nations in respect to neutral property is controlled to a considerable extent by treaties, between different countries, and it would seem that the terms and provisions of the treaties must be strictly complied with.[2]

Another division of this question of neutrality is that of blockade. The questions in respect to this subject have been treated somewhat at length in the first volume,[3] and we do not consider it necessary to repeat them here; merely adding some additional rules which have been the subject of adjudication. It has been held that if notice of a blockade has been formally made to a foreign government, no individual of that nation will be allowed to aver ignorance of it as against the blockading power.[4] But as between the parties to the contract of insur-

[1] Barker *v.* Blakes, 9 East, 283. In the case of The Nereide, 9 Cranch, 388, *Marshall*, C. J., said: "The rule that the goods of an enemy found in the vessel of a friend are prize of war, and that the goods of a friend found in the vessel of an enemy are to be restored, is believed to be a part of the original law of nations, as generally, perhaps universally, acknowledged. In the practical application of this principle, so as to form the rule, the propositions that the neutral flag constitutes no protection to enemy property, and that the belligerent flag communicates no hostile character to neutral property, are necessarily admitted. The character of the property, taken distinctly and separately from all other considerations, depends in no degree upon the character of the vehicle in which it is found."

This question has been materially affected by late treaties made with reference to the war of the allies, England, France, and Turkey, against Russia.

[2] The treaty of 1778, between France and the United States, provided "that in case either of the parties should be engaged in war, the ships and vessels belonging to the people of the other ally must be furnished with sea-letters or passports, expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master or commander of the said ship." Under this clause it has been held that a passport to G. D., master or commander of the ship called The Mount Vernon, of the town of Philadelphia, of the burden of 424 27-95 tons, being at present in the port of Philadelphia," etc., was not sufficient, because the place of habitation of the master was not set forth, the words "of the town of Philadelphia" being held to apply to the ship and not to the master. Baring *v.* Christie, 5 East, 398; Baring *v.* Clagett, 3 B. & P. 201.

[3] See Vol. 1, p. 276.

[4] See Vol. 1, p. 277.

ance, it is always a question of fact, whether there was actual notice or knowledge.[1]

If the blockading squadron is driven off by a storm or a change of wind, the presumption is that there is an intention to return, and there is therefore no discontinuance of the blockade.[2] But this presumption does not exist when the squadron is driven off by a superior force; but notice must be given of the recommencement of the blockade, either by public declaration or by the notoriety of the fact.[3] The blockade must be strictly observed on the part of the blockading force. If, therefore, they permit some vessels to pass the line of blockade and enter the port, other ships may presume the blockade to be raised, and attempt to enter without leave.[4] And a relaxation of a blockade in favor of belligerents, to the exclusion of neutrals, is illegal.[5] If permission to enter is obtained from the commander of the blockading force through fraud or falsehood, it is certainly of

[1] In Harratt *v.* Wise, 9 B. & C. 712, Lord *Tenterden*, C. J., said: "Although the blockading nation may, by the law of nations, be allowed to consider its notification of a blockade, as notice thereof to all the subjects of the nation to which the notification has been made, for it cannot be expected that the blockading nation should be able or required to prove actual knowledge in the master of every vessel of the other country, yet such a rule, allowing it to prevail to the supposed extent (though it appears probably to be open to some qualification and relaxation for the furtherance of justice and the benefit of commerce), cannot, in our opinion, be applied to the case of insurance. And, if the possibility, or even probability, of actual knowledge should be considered as legal proof of the fact of actual knowledge, as a *presumptio juris et de jure*, the presumption might, in some cases, be contrary to the fact, and such a rule might work injustice. We therefore think that such a rule cannot be established as a rule of insurance law; but that knowledge, like other matters, must become a question of fact for the decision and judgment of a jury." See also, Naylor *v.* Taylor, 9 B. & C. 718; Medeiros *v.* Hill, 8 Bing. 231.

[2] The Neptunus, 1 Rob. Adm. 170, 171; The Frederick Molke, id. 86; The Columbia, id. 154, 156; The Juffrow Maria Schroeder, 3 Rob. Adm. 147; Radcliff *v.* United Ins. Co., 7 Johns. 38, 54.

[3] The Triheten, 6 Rob. Adm. 65; The Hoffnung, 6 Rob. Adm. 112.

[4] The Rolla, 6 Rob. Adm. 364, 372. In Oldden *v.* M'Chesney, 5 S. & R. 71, the court said: "There is no necessity for perfect uniformity in maintaining a blockade, because there may be particular reasons for permitting particular vessels to go in, or out. But the blockade should be preserved in so steady a manner, as not to give neutrals just cause for supposing that it is raised. This they must suppose, if ships are capriciously permitted to enter, or depart. The neutral certainly goes upon ticklish ground, who ventures to depart, while any of the belligerent ships are in the neighborhood. All that can be said of the law is, that a neutral ship ought not to be condemned for breach of blockade, if other ships under the same circumstances have been permitted to depart."

[5] Northcote *v.* Douglas, 10 Moore, P. C. 37.

no validity; but if permission is given, upon a *bonâ fide* statement of all the facts in the case, it would clearly seem that the vessel could not afterwards be arrested.[1] And it has been held that if a vessel sails for a blockaded port and is informed on the way by a vessel of the blockading power, though it does not belong to the blockading fleet, that the port is open, the master may proceed on his course.[2]

It has been said that in some instances, "licenses are to be favorably regarded, and that it imports the good faith and honor of the government which grants them, not to press the letter too rigorously."[3]

A distinction exists between the liability of the cargo and of the ship to condemnation for a breach of a blockade. *Primâ facie* the cargo is considered as liable to condemnation, if any breach has been made which subjects the ship to condemnation.[4] But the cargo is not liable to condemnation if it is the property of a person other than the owner of the ship, and its owner was not cognizant of the intended violation.[5] If, however, the owners of the cargo gave the master discretionary power, they are liable for his acts;[6] or if the cargo was loaded after notification of the blockade, the parties having full knowledge of the fact.[7] And so they are *a fortiori*, if they are also owners of the ship.[8]

[1] Oldden *v.* M'Chesney, 5 S. & R. 71. Some doubt is expressed in this case whether such a right would exist if it were manifest "that the commander acted in violation of an order of his sovereign, which had been made known to the world."

[2] The Neptunus, 2 Rob. Adm. 110.

[3] The Juno, 2 Rob. Adm. 116. In this case the vessel sailed for Amsterdam, not knowing that the port was blockaded. The master, when he found it out, petitioned for leave to export to the Vlie, Embden, or Rotterdam; and permission was given him to go to the ports of the Vlie, Embden, Rotterdam, or elsewhere. It was held that he might go to Amsterdam through the Texel as well as through the Vlie passage. And although the license said nothing about coming out again, yet it was held that this was a benefit incidental to the license, and inseparable from it. And under all the circumstances of the case, the master having taken a return cargo and sailed openly and *bonâ fide*, it was held that if he was wrong he acted under a misapprehension that the blockade as to him was entirely relaxed, and that his vessel therefore was not liable to condemnation.

[4] The Neptunus, 3 Rob. Adm. 173.

[5] The Mercurius, 1 Rob. Adm. 80; The Exchange, Edw. Adm. 39, 43; The Adelaide, 3 Rob. Adm. 281.

[6] The Columbia, 1 Rob. Adm. 154.

[7] The Adonis, 5 Rob. Adm. 256.

[8] The Mentor, 1 Act. 60.

A blockade may be broken by egress as well as by ingress.[1] No notice of a blockade, after it has existed *de facto* for any length of time, is necessary to be made to vessels confined in the port, "the continued fact being of itself sufficient notice."[2] A vessel may leave a blockaded port in ballast,[3] or with a cargo placed on board before the declaration of the blockade.[4] But if placed on board afterwards, both vessel and cargo are condemned, provided the cargo belongs to the owner of the ship, or its owner was cognizant of the act of the captain.[5] And this right to leave a port with a cargo laden on board before the declaration of the blockade is to be construed strictly, and does not exist unless the cargo was actually on board, or in lighters for the purpose of being conveyed to the ship, although it may have been purchased and warehoused previously to the notification.[6]

If the cargo has been sent in previously to the blockade, it may be withdrawn by the owner.[7] And the minister of a neutral country may charter a vessel to send home distressed seamen of his country; but if a cargo is taken in the vessel both it and the vessel are liable to condemnation.[8] So it is a breach of the blockade, if a vessel, after the blockade is notified, continues to embark cargo.[9] And if a master voluntarily enters a blockaded port and is there compelled to sell his cargo, this is no excuse

[1] Tottie *v.* Heathcote, 10 Moore, P. C. 70.

[2] The Vrouw Judith, 1 Rob. Adm. 150.

[3] The Potsdam, 4 Rob. Adm. 89; The Juno, 2 Rob. Adm. 116, 119. But a ship cannot enter a port in ballast, even if the purpose be to bring away a cargo purchased previously to the blockade. The Comet, Edw. Adm. 32.

[4] Olivera *v.* Union Ins. Co., 3 Wheat. 183; The Vrouw Judith, 1 Rob. Adm. 150.

[5] The Frederick Molke, 1 Rob. Adm. 86.

[6] Oldden *v.* M'Chesney, 5 S. & R. 71. In The Rolla, 6 Rob. Adm. 364, 371, it was argued that the rule did not apply to a cargo consisting of hides and tallow, and other articles, of which, in warm climates, it would be necessary to defer the shipment till the last moment, and that a possession in warehouses should be taken as equivalent to the possession by shipment, but Sir *William Scott* said: "I do not feel that there is any just call upon me to distinguish in their favor, or to depart in this particular case from those rules which the court has felt itself under the necessity of laying down, to prevent the continual danger of being imposed on by particular evidence, if I was to permit the exemption to be carried further than to a delivery on board the ship, or in lighters."

[7] The Juffrow Maria Shroeder, cited 4 Rob. Adm. 89.

[8] The Rose in Bloom, 1 Dods. 57, 58.

[9] The Calypso, 2 Rob. Adm. 298.

for the breach of the blockade.[1] And it is a breach if he there purchases an enemy's vessel.[2] An exception to this rule is made where the vessel was originally the property of the purchaser, in which case the transaction is considered as a ransom or compromise.[3] Nor does the rule apply to the case of a vessel purchased of one neutral by another.[4]

If a vessel escapes from a blockaded port she may be captured in any part of her voyage.[5] And where a vessel sailed from a blockaded port in France for New Orleans, it was held that the voyage was not so terminated by her being driven into a port of Great Britain, as to prevent her being seized there.[6] If a place is not invested by land as well as by sea, it has been held that if goods are taken from it by land, or in any other way which is not blockaded, and then shipped, they are not liable to be seized.[7]

C. *Of the Warranty of Convoy.*

The clause containing the warranty to sail with convoy, which is common in English policies in time of war, is seldom, if ever, employed in this country.[8] It may, however, be well to state briefly some of the leading English decisions upon this subject.

As a general rule the convoy must be for the whole voyage;[9] but as the entire system of convoys is under the direction and control of government, it follows that the warranty is complied with by joining a convoy, however small it may be,[10] even if it is not

[1] The Byfield, Edw. Adm. 188.

[2] The General Hamilton, 6 Rob. Adm. 61; The Vigilantia, 6 Rob. Adm. 122.

[3] The Rose in Bloom, 1 Dods. 57.

[4] The Vigilantia, 6 Rob. Adm. 122.

[5] The Welvaart Van Pillaw, 2 Rob. Adm. 128.

[6] The General Hamilton, 6 Rob. Adm. 61.

[7] The Ocean, 3 Rob. Adm. 297; The Stert, 4 id. 65. And goods may be sent to a blockaded port in the same indirect way. The Jonge Pieter, 4 Rob. Adm. 79.

[8] In England this subject has been to some extent provided for by statute. See 13 Car. 2, stat. 1, c. 9, § 13; 22 Geo. 2, c. 33, § 17; 38 Geo. 3, c. 76; 43 Geo. 3, c. 57. For decisions under these statutes, see Cohen *v.* Hinckley, 1 Taunt. 249; Henderson *v.* Hinde, id. 250, note; Hinckley *v.* Walton, 3 id. 131; Long *v.* Duff, 2 B. & P. 209; Carstairs *v.* Allnutt, 3 Camp. 497; Metcalfe *v.* Parry, 4 Camp. 123.

[9] Lilly *v.* Ewer, 1 Doug. 72; Jeffery *v.* Legender, 3 Lev. 320.

[10] Manning *v.* Gist, 3 Doug. 74. The commander of the convoy in this case sent a

going to the port of destination of the vessel insured, but the latter will have to join another convoy[1] or even to proceed alone,[2] if vessels to that port are so directed by the government. If a general rendezvous is appointed, the vessel may sail for that place without convoy,[3] although there is a convoy for ships bound for other destinations between the port of loading and the place of rendezvous.[4] But if the convoy is gone when the vessel arrives, she cannot endeavor to overtake it;[5] nor is it sufficient to sail under the protection of a single man-of-war which does not belong to the convoy;[6] nor with a convoy appointed for another voyage, though it may be bound upon the same course for the greater part of the way.[7]

It is generally necessary to obtain sailing orders, because without them the captain cannot answer signals, or know the place of rendezvous in case of a storm, and he does not in effect put himself under the protection of the convoy.[8] But the obtaining the orders does not seem to be in the nature of a condition precedent, for if the commander of the convoy refuses to give them,[9] or they cannot be obtained on account of the weather, the vessel may sail without them.[10]

single man-of-war to bring vessels to a certain place to join the rest of the convoy, and it was held, that the warranty was complied with by sailing with this vessel.

[1] De Garay *v.* Clagget, Park, Ins. 455. See also, Smith *v.* Readshaw, per Lord *Mansfield*, C. J., Park, Ins. 454.

[2] In D'Eguino *v.* Bewicke, 2 H. Bl. 551, the vessel was going to St. Sebastian, and the convoy only went to Bilboa. It was held, that as neither party could know the instructions of government, it was a sufficient compliance with the warranty if the assured took the convoy provided.

[3] Lethulier's Case, 2 Salk. 443; Bond *v.* Gonsales, 2 Salk. 445; Gordon *v.* Morley, 2 Stra. 1265; Campbell *v.* Bordieu, id.; Hinckley *v.* Walton, 3 Taunt. 131, 136, per Lord *Mansfield*, C. J.

[4] Warwick *v.* Scott, 4 Camp. 62.

[5] Cohen *v.* Hinckley, 1 Taunt. 249. See also, Gale *v.* Machell, Park, Ins. 529, 2 Marsh. Ins. 659.

[6] Hibbert *v.* Pigou, Park, Ins. 443. The vessel in this case sailed with a single ship of war, joined the convoy, and was subsequently lost. It was held, that as she had not sailed with convoy in the first instance, the underwriters were not liable.

[7] Cohen *v.* Hinckley, 1 Taunt. 249.

[8] Webb *v.* Thompson, 1 B. & P. 5; Anderson *v.* Pitcher, 3 Esp. 124, 2 B. & P. 164. See also, Hibbert *v.* Pigou, Park, Ins. 443, where this question was discussed but not decided.

[9] Veedon *v.* Wilmot, Park, Ins. 444, note.

[10] Victorin *v.* Cleeve, 2 Stra. 1250.

If a vessel neglects to obey sailing orders in starting, this is a breach of the warranty.[1] Not only must a vessel sail with the convoy, but it would seem that she must start as soon as possible, and if she delays, and is lost in consequence thereof, the underwriters are exonerated, although some of the vessels started after she did.[2] If the fleet is dispersed by a storm, the vessel insured may run immediately for her port of destination.[3] So if she is driven back to the port of clearance, she may sail again without waiting for a convoy from that port, or joining one at another port.[4] And it has been held, that if, after the vessel has once joined the convoy, she is separated and lost, the underwriters are liable unless the separation was caused by the wilful fault of the master.[5]

D. *Of the Warranty of the Time of Sailing.*

Another express warranty of frequent occurrence, is that which relates to the time of the ship's sailing.[6] As to this it is

[1] Taylor *v.* Woodness, Park, Ins. 454.

[2] Waltham *v.* Thompson, 1 Marsh. Ins. 376.

[3] Audley *v.* Duff, 2 B. & P. 111. See also, Manning *v.* Gist, 3 Doug. 74.

[4] Laing *v.* Glover, 5 Taunt. 49. This case was, however, decided under the provisions of the statute of 43 Geo. 3, c. 57. See *contra*, Morrice *v.* Dillon, 2 Selw. N. P. 11th ed. 1005.

[5] Jeffries *v.* Legandra, 2 Salk. 443.

[6] In Baines *v.* Holland, 10 Exch. 801, 32 Eng. L. & Eq. 503, the vessel was insured at and from New York to Quebec, during her stay there, and thence to the United Kingdom; the said ship being warranted to sail from Quebec on or before the 1st of November, 1853. The vessel was lost on the voyage from New York to Quebec. It was set up in defence, that on the 1st November the vessel was at sea on her voyage from New York to Quebec, that the loss did not take place till after the 1st, and that the vessel did not sail from New York in time to enable her to complete the voyage to Quebec, and comply with the warranty of sailing from that port on or before the 1st. On demurrer it was held that the warranty was to be construed as an undertaking to sail from Quebec on or before the 1st, if the vessel arrived there by that time. *Parke*, B., said: "The most natural construction is, that, so far as relates to the voyage from New York to Quebec, the policy is altogether without limitation as to time; but, as regards the voyage from Quebec to the United Kingdom, the underwriters are not responsible unless the vessel sails from Quebec, on or before the 1st of November, 1853." In Colledge *v.* Harty, 6 Exch. 205, 3 Eng. L. & Eq. 550, the policy was made subject to certain rules, one of which was that vessels were not to sail "from any port on the east coast of Great Britain, between the 5th of October and the 5th of April to any port or place in the Baltic or *to* any port or place in the Belts between the 20th of December, and the 15th of February." On the 8th of February

now quite clear that a ship sails when she weighs anchor or casts off her fastenings and gets under way, if the intention be to proceed at once to sea, without further delay.[1] But if not

the plaintiff's vessel sailed from Newcastle upon Tyne for a port in the Belts. It was held that the rule was a warranty, and that "*to*" meant towards, and that the defendant therefore was not liable.

[1] The ship must be actually moving on her voyage; hence, in a case where there were two anchors out, and one was raised on the day on which she was warranted to sail, and the captain was prevented from raising the other by a heavy swell, it was held not to be a compliance with the warranty, although the ship lay over night with only one anchor, and got under way the next morning without having had communication with the shore. Nelson *v.* Salvador, Moody & M. 309, Danson & Ll. 219.

But if she moves with the intention of prosecuting her voyage, that is sufficient. In Cochran *v.* Fisher, 4 Tyrw. 424, 2 Cromp. & M. 581, the ship was lying in a dock at Dublin, warranted not to sail after August 15. On that day she cleared at the custom-house, and was ready for sea, but as the wind blew directly up the river so that it was impossible to sail, she was warped down the river about half a mile. It was impossible for her to get out of the harbor on that day, and she did not leave till the 17th. Lord *Lyndhurst*, C. B., said: "The question turns entirely on the intention of the captain; if, at the time of breaking ground and moving the vessel, he proceeded down the river with a *bonâ fide* intention of placing her in a more favorable position from which to prosecute the voyage, that would be a compliance with the warranty; but if, as there is some reason to apprehend, he left the dock and warped his vessel down to the place at which she took ground, with no other object than merely and solely to comply with the letter of the warranty, that would not be such a sufficient commencement of the voyage as would be a compliance with the warranty." *Alderson*, B., held it to be sufficient if the vessel was moved for mixed purposes. On a new trial the jury found that the master and crew intended to put the vessel in a more favorable situation for prosecuting the voyage, and not merely and solely to fulfil the warranty; but that at the time when the vessel quitted the dock, he knew it was impossible to get to sea that day. The court then held on this finding that there had been a compliance with the warranty. Fisher *v.* Cochran, 5 Tyrw. 496, 1 Cromp. M. & R. 809. See also, Bowen *v.* Hope Ins. Co., 20 Pick. 275; Union Ins. Co. *v.* Tysen, 3 Hill, 118.

In Bond *v.* Nutt, Cowp. 601, the insurance was at and from Jamaica, warranted to have sailed on or before the 1st of August, 1776. The ship, before that time, sailed from St. Anne's to Bluefields, the general rendezvous for convoy at the Jamaica Station, expecting to join convoy there and sail immediately for England. When she arrived at Bluefields, she was detained beyond the time by an embargo. The question was whether the warranty with regard to the time of sailing was complied with. Lord *Mansfield* said: "The question, then, is a matter of fact, and one that admits of no latitude, no equity of construction, or excuse. Had she, or had she not sailed on or before that day? That is the question. No matter what cause prevented her; if the fact is that she had not sailed, though she staid behind for the best reasons, the policy was void; the contingency had not happened; and the party interested had a right to say there was no contract between them. Therefore, what Mr. Wallace said in the argument, is very true. If she had been prevented by any accident, from sailing until the 2d of August, as by the sudden want of any necessary repair, or if an enemy had been at the mouth of the port, the captain would have done very right not to sail,

entirely ready for sea, she has not sailed by merely moving down the harbor.[1] If she moves, ready and intended for sea, but is

but there would have been an end of the policy. The great distinction is this: that she sailed from St. Anne's to London by the way of Bluefields; and that it was not a voyage from St. Anne's to Bluefields, with any object or view distinct from the voyage to England. If she had gone first to Bluefields for any purpose independent of her voyage to England, to have taken in water or letters, or to have waited in hopes of convoy coming there, none being ready, *that* would have given it the condition of *one* voyage from St. Anne's to Bluefields, and *another* from Bluefields to London."

See also, Earle *v.* Harris, 1 Doug. 357; Wright *v.* Shiffner, 2 Camp. 247, 11 East, 515; Lang *v.* Anderdon, 3 B. & C. 495, 5 Dowl. & R. 393, 1 Car. & P. 171; and cases in the next note.

[1] Pettegrew *v.* Pringle, 3 B. & Ad. 514; Lang *v.* Anderdon, 3 B. & C. 495, 499; Graham *v.* Barras, 3 Nev. & M. 125, 5 B. & Ad. 1011; Ridsdale *v.* Newnham, 4 Camp. 111, 3 M. & S. 456. In Pettegrew *v.* Pringle, 3 B. & Ad. 514, the ship was warranted not to sail from ports in Ireland after the 1st of September. The ship dropped down the river from the port of Sligo before that time, in readiness for sea, except that she had not her full quantity of ballast, there being a bar at the mouth of the river which the ship could not cross with the full quantity on board. Boats were waiting outside on the 1st of September, to ship the remainder of the ballast, and the vessel crossed the bar on that day, but struck in doing so, and the master, to ascertain what damage she had received, put into an adjacent port without taking the rest of his ballast, and this was not done till the fourth. Held, that the ship's dropping down the river and crossing the bar, without full ballast, was not sailing. Lord *Tenterden*, C. J., said: "The general principle of the decisions is this; that if a ship quits her moorings and removes, though only to a short distance, being perfectly ready to proceed upon her voyage, and is by some subsequent occurrence detained, that is nevertheless a sailing; but it is otherwise, if at the time when she quits her moorings and hoists her sails, she is not in a condition for completing her sea voyage." In Thompson *v.* Gillespy, 5 Ellis & B. 209, 32 Eng. L. & Eq. 153, the question arose whether the vessel had sailed from Sunderland for Constantinople pursuant to a charter-party. She had left the harbor with an incomplete crew, the master and mate were not on board, the shrouds and cables had not been put in proper condition for the voyage, and the bills of lading were not signed. The ship left the harbor with the intention of anchoring in the roadstead till every thing was ready for the voyage. Held that this was not a sailing. See also, Hudson *v.* Bilton, 6 Ellis & B. 565, 36 Eng. L. & Eq. 248; Sharp *v.* Gibbs, 1 H. & N. 801, 40 Eng. L. & Eq. 383. In Williams *v.* Marshall, 6 Taunt. 390, 2 Marsh. 92, 1 J. B. Moore, 168, 7 Taunt. 468, the vessel was licensed to export goods from the port of London before the 10th of the month. The vessel cleared on the 9th at the London custom-house, and arrived at Gravesend on the 12th. There the master is required to deliver certain papers, and he then receives the cockets and the clearing notes. When any drawback is to be repaid to the master on exportation, he cannot entitle himself to it without producing this clearing note. *Gibbs*, C. J., in 6 Taunt. 390, said: "Whether she was covered by this license, or not, depends on the question whether she sailed on the 10th. I cannot say, however I may be disposed to favor the plaintiffs, that the clearing at the custom-house is an exportation. Considerable light is thrown on the question by the fact, that by the regulations, or at least by the practice of this country, the drawback is not paid till after the passing Grave-

afterwards accidentally and compulsorily delayed, this is a sailing.[1] But if when ready and intending to sail, she is stopped by a storm or some similar obstruction *ab extra* before she gets under way, it may not be easy to reconcile the authorities. But the reasons given in some of the cases might lead to the conclusion, that, if the policy is not to attach until the vessel sails, it does not attach until an actual sailing, however that may be prevented. But if the policy has previously attached while the ship is in port, and the fact of her sailing or leaving the port on a certain day is a distinct warranty, and she is ready and intending to sail on that day, and is prevented by an accident or obstruction *ab extra*, it has been held that there is no breach of the warranty. But this may perhaps be doubtful.[2]

If the warranty be to sail from a place, a coast, or an island, on or before a certain day, the warranty is not complied with by sailing from it to return immediately to it, or from one port in the coast or island to another, but there must be an absolute setting sail with an intent to go finally away from it.[3] It has been held, but, as we think, on insufficient reasons, that a warranty "to depart" means more than a warranty "to sail;" and if a

send; and therefore upon the interpretation which has prevailed, of those acts of parliament which give a drawback, it appears that ships are not considered as having exported till after passing Gravesend; therefore, with every disposition to favor this action, we cannot say that the plaintiffs are entitled to recover."

[1] Thellusson *v.* Fergusson, 1 Doug. 361; Thellusson *v.* Staples, 1 Doug. 366, note; Earle *v.* Harris, 1 Doug. 357. See also the two preceding notes.

[2] Hore *v.* Whitmore, Cowp. 784; Bond *v.* Nutt, Cowp. 601, and cases cited in the three preceding notes. In Hore *v.* Whitmore, the insurance was at and from Jamaica to London, warranted to sail before 26th July, 1776, and free from all restraints and detainments of kings, princes, etc. The ship was ready to sail before the time, but was detained by an embargo. It was contended that the embargo being expressly insured against, excused the delay. But on the other hand, it was said "that the warranty was positive and express, that the ship should depart on or before the day appointed, and therefore must be complied with. And of this opinion was the court."

[3] See Wright *v.* Shiffner, 11 East, 515; Cruikshank *v.* Janson, 2 Taunt. 301; Ridsdale *v.* Newnham, 3 M. & S. 456; Dennis *v.* Ludlow, 2 Caines, 111. In Lang *v.* Anderdon, 3 B. & C. 495, the counsel argued that a different construction should be put upon the words "*sail from*," from that put upon the word "sail." The court did not reject the distinction, but held that it was not necessary for the decision of that case, and it appears never to have been since adopted by the courts. See 1 Arnould on Ins. 602. If insurance is effected on a vessel at A, with liberty to touch at B, warranted to sail after a certain day, the warranty applies to the sailing from A, and the vessel must leave that port after the day named. Vezian *v.* Grant, Park on Ins. 430.

vessel unmoors and gets under way, and is prevented by stress of weather from getting clear of the harbor, this would be no breach of a warranty "to sail," but is one of a warranty "to depart."[1] And the terms "final sailing,"[2] or being "despatched

[1] Moir *v.* Royal Exchange Ass. Co., 3 M. & S. 461, 6 Taunt. 241, 1 Marsh. 576, 4 Camp. 84. In this case some stress seems to have been laid upon the fact that the use of the word "depart" in the policy was a deviation from the usual practice, which was to use the word "sail."

In Van Baggen *v.* Baines, 9 Exch. 523, 25 Eng. L. & Eq. 530, a question arose as to the meaning of the following provision in a charter-party: "Sail and proceed from Amsterdam with all convenient speed to Liverpool, *to leave* Amsterdam not later than all March." It was in evidence that Amsterdam was an inland port, and that vessels sailing from it had to pass through a canal about sixty miles in length, to the port of departure called Nieuve Diep. Between these places vessels are towed by horses, and frequently take in their ballast at one of the villages on the route, though it may be taken in at Amsterdam. The vessel sailed from Amsterdam on the 31st of March with part of her ballast on board. The rest was taken in at a village on the canal, and the vessel did not sail from thence till the 3d of April. It was held that the charter-party was complied with. *Parke*, B., said: "In Moir *v.* Royal Exch. Ass. Co., the word 'depart' was held to mean something more than 'sail,' but that depended on the language of the policy. Cases have been cited as to the meaning of the word 'sail,' but they have no application to this case, because here there is no warranty as to sailing from Amsterdam. The whole question turns upon the meaning of the word 'leave,' and not on the words 'sail and proceed.'"

[2] This is shown by the case of Roelandts *v.* Harrison, 9 Exch. 444, 25 Eng. L. & Eq. 470. The vessel was in a dock at Cardiff, ready for sea, and had her clearances from the custom-house. There was communication from the dock to the sea at high-water by means of dock gates, but from these down to the low-water mark there was a ship channel, where vessels were towed by steam-tugs, and were liable to be stopped by the harbor-master. The vessel proceeded from the dock gates along the ship canal, and then took the ground, and afterwards was carried back to the dock gates, where she grounded and was finally lost. By the charter-party three fourths of the freight were payable on the final sailing of the vessel from her port of loading, and the question arose whether it was due under the circumstances of this case. *Parke*, B., said: "The question is, whether that period of time had arrived at which three fourths of the freight was to be paid. If it had been three fourths to be paid at the time of sailing of the vessel from the port of lading simply, then, according to several cases on the insurance law, the sailing is determined to be that period of time when the vessel breaks ground, being at that time fully fit for sea, having the cargo on board which she intends to carry, with a competent crew, and having permission to leave, by having the custom-house clearances on board. If that had been the criterion in this case, we think the vessel might possibly be considered as having broken ground; but that is a point of some doubt. Certainly, she was fit for sea in every other respect, and probably a warranty to sail by a given time would have been complied with; but we all think, upon reading this charter-party, that something more is meant than the sailing of the vessel, because they use the term 'the final sailing of the vessel,' and we are not at liberty to reject that term, and we must consider that it is adopted with reference to the particular port of Cardiff where the vessel is to take on board her cargo, and that it

from" a place[1] mean something more than is expressed by the word sailing.

E. *Of Particular Warranties and Stipulations.*

A great variety of warranties and stipulations have been occasionally introduced into policies of insurance, and much litigation has grown out of them. The warranty of the condition and location of the vessel, usually refers to her crew, or her furniture or equipments, or her armament; but all these things are far more frequently left to the implied warranties to be spoken of presently. Sometimes an express warranty refers to the place of the ship; as "warranted in such a harbor," or insurance from a place "where the ship now is;" and this means that at the date of the policy, or rather when the insurance is actually made, the ship is at the warranted place.[2] And if there be insurance at or from a certain port, with "warranted in port," this means the port of insurance, unless another meaning is clearly to be gathered from the policy.[3] A warranty that a vessel

means something more than merely having the clearances on board and being ready, and that it means her final departure from that port, and being out of the limits of that artificial port, and being at sea ready to proceed upon her voyage. And with reference to the circumstances of the port, we do not think this vessel can be considered as having finally sailed from her port of lading."

[1] In Sharp *v.* Gibbs, 1 H. & N. 801, 40 Eng. L. & Eq. 383, there was a stipulation in the charter-party that if the ship should be "despatched" from Australia within twenty-one days after her arrival, the owners should be entitled to a higher rate of freight than that previously agreed on. The vessel sailed within the time mentioned, but after proceeding a short time was obliged to put back on account of the insubordination of the crew, and did not finally depart till after the twenty-one days had expired. Held that she had not been "despatched" within the meaning of that phrase in the charter-party.

[2] Callaghan *v.* Atlantic Ins. Co., 1 Edw. Ch. 64.

[3] Kenyon *v.* Berthon, 1 Doug. 12, note. In Colby *v.* Hunter, 1 Moody & M. 81, 3 Car. & P. 7, the insurance was from Hamburg to Vigo. The ship was warranted in port on the 19th October. She was in a port, but not that of Hamburg. It was contended that this satisfied the warranty; but it was held otherwise, Lord *Tenterden*, C. J., remarking that, "if the underwriters had been satisfied with the more general warranty contended for, the usual warranty of "safe on 19th of October," would have been the sufficient and proper mode of expressing it."

If the policy had been on time, no *terminus a quo* being mentioned, the construction contended for would probably have been adopted.

was well on a certain day, has been held to be satisfied by proof that she was so at any time during the day.[1]

A policy on "lawful goods" has been held to cover contraband goods.[2] And a warranty that the vessel "shall have no contraband goods on board," does not refer to illicit trade at the port of destination, but merely to such goods as are contraband of war.[3]

The rotten clause, as it is called, is inserted in many policies. This provides that if a ship, on a regular survey, shall be declared unseaworthy, by reason of being rotten or unsound, the underwriters shall be discharged. Under this clause it is settled that the survey must find the rottenness or unsoundness to be the sole cause of the unseaworthiness;[4] that the underwriters are discharged if the vessel be found rotten at the time of the survey, without reference to her condition when the risk commenced;[5] that the survey need only state facts from which it can be inferred that the unseaworthiness arose solely from rottenness, and need not conform exactly to the expressions used in the policy;[6] that it is sufficient if the survey be made in a reasonable time after the termination of the voyage;[7] and that the report of the surveyors on a regular survey is conclusive upon the parties.[8] As to what constitutes a regular survey, it has

[1] Blackhurst *v.* Cockell, 3 T. R. 360.

[2] Seton *v.* Low, 1 Johns. Cas. 1; Juhel *v.* Rhinelander, 2 Johns. Cas. 120; Depeyster *v.* Gardner, 1 Caines, 492. See also, Skidmore *v.* Desdoity, 2 Johns. Cas. 77; Richardson *v.* Maine F. & M. Ins. Co., 6 Mass. 102.

[3] Vandevoort *v.* Smith, 2 Caines, 155. In regard to the origin of this warranty, see note to Seton *v.* Low, 1 Johns. Cas. 1, 15.

[4] Innes *v.* Alliance Mut. Ins. Co., 1 Sandf. 310; Haff *v.* Marine Ins. Co., 8 Johns. 163; Griswold *v.* National Ins. Co., 3 Cow. 96; Armroyd *v.* Union Ins. Co., 2 Binn. 394; Watson *v.* Ins. Co. of N. A., 2 Wash. C. C. 152. In Rogers *v.* Niagara Ins. Co., 2 Hall, 86, the defendants pleaded that the vessel sought a port of necessity, that a regular survey was had, that the survey found that certain parts of the vessel, enumerating them, were rotten, that other parts were so defective that they would require to be shifted, that the repairs would amount to $3,000, and that in the opinion of the surveyors the vessel was unworthy of repairs, and would not sell for the amount of the bills. On demurrer, this plea was held to be a good bar to the plaintiff's action.

[5] Dorr *v.* Pacific Ins. Co., 7 Wheat. 581.

[6] Brandegee *v.* National Ins. Co., 20 Johns. 328; Steinmetz *v.* U. S. Ins. Co., 2 S. & R. 293; Rogers *v.* Niagara Ins. Co., 2 Hall, 86.

[7] Griswold *v.* National Ins. Co., 3 Cow. 96, 98.

[8] Dorr *v.* Pacific Ins. Co., 7 Wheat. 581.

been held that one made by surveyors, appointed by the American consul at a foreign port is such.[1] So is one by surveyors under a State law, there being no act of congress upon the subject.[2] If the survey is instituted at the instigation of the master, it is conclusive upon the owners of the vessel.[3]

If the assured warrants that "orders will be given that the ship shall not cruise," he must explicitly direct the captain not to cruise, and the fact that such orders might be inferred from the instructions is not sufficient.[4]

A warranty that on a voyage described, the assured shall have a passport from a particular person is only satisfied by a passport for the whole voyage, and it must be such a one as is usually given.[5]

A stipulation to claim, as neutral, in case of capture, a belligerent vessel sailing with neutral papers, is valid, and if not performed, the insured cannot recover.[6]

In addition to these warranties and stipulations there are some which we have already considered, such as the stipulations in respect to assignments,[7] and clauses relative to prior and subsequent insurances.[8] There are also others which have been introduced from time to time limiting or affecting the common law rights and liabilities of the parties. These we shall treat of hereafter.

[1] Innes *v.* Alliance Ins. Co., 1 Sandf. 310.

[2] Janney *v.* Columbian Ins. Co., 10 Wheat. 411. In Dorr *v.* Pacific Ins. Co., 7 Wheat. 581, the court said: "A regular survey must, therefore, in every instance, be such as is known to the laws and customs of the port in which a vessel happens to be."

[3] Janney *v.* Columbian Ins. Co., 10 Wheat. 411; Dorr *v.* Pacific Ins. Co., 7 id. 581; Polleys *v.* Ocean Ins. Co., 14 Maine, 141.

[4] Ogden *v.* Ash, 1 Dall. 162.

[5] Bulkley *v.* Derby Fishing Co., 1 Conn. 571.

[6] Coolidge *v.* Blake, 15 Mass. 429. In Thatcher *v.* Bellows, 13 Mass. 111, the assured agreed, in case of capture, to claim and prosecute as Spanish property, until condemnation in the High Court of Admiralty, or acquittal. And the assurers agreed to contribute to the expenses, according to their respective interests. Held, that the underwriters were not bound to advance funds to prosecute the appeal.

[7] See ante, p. 45.

[8] See ante, p. 96.

SECTION II.

OF IMPLIED WARRANTIES.

There are many important warranties which are seldom expressed because they are always implied; in other words, it is not necessary that the parties should make them, because the law makes them for the parties. By far the most important of these, is the warranty of sea-worthiness.[1] Every person who proposes to any insurers to insure his ship against sea perils, during a certain voyage, impliedly warrants that his ship is, in every respect, in a suitable condition to proceed and continue on that voyage, and to encounter all common perils and dangers with safety.[2] And this applies to every insurance on a voyage policy, whatever be the interest insured. And in one case where the insurance was effected by salvors on a vessel at and from a certain port to another, the vessel being described in the policy as having been abandoned by her original crew and taken into the port at which the risk was to commence, by the salvors in whose interest the policy was declared to be effected, the court held, that a plea, that the vessel was unseaworthy at the time of sailing, was good.[3]

[1] In Small *v.* Gibson, 16 Q. B. 141, 3 Eng. L. & Eq. 299, 305, *Parke*, B., said: "The late Lord *Abinger* used to say (not judicially) that the warranty was implied from the use of the term 'good' in the policy." The learned judge then goes on to show that this is not correct, and that the use of the word is neither an express nor an implied warranty of sea-worthiness.

[2] In Dixon *v.* Sadler, 5 M. & W. 405, 414, *Parke*, B., states the law as follows: "In the case of an insurance for a certain voyage, it is clearly established that there is an implied warranty that the vessel shall be sea-worthy, by which it is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured at the time of sailing upon it." See also, Wedderburn *v.* Bell, 1 Camp. 1; Myers *v.* Girard Ins. Co., 26 Penn. State, 192; Cincinnati Mut. Ins. Co. *v.* May, 20 Ohio, 211; McCargo *v.* Merch. Ins. Co., 10 Rob. La. 334; Prescott *v.* Union Ins. Co., 1 Whart. 399. If insurance is effected on a floating dock there is an implied warranty that it is sea-worthy, well built, staunch, and capable for the business in which it is to be employed, fitted with machinery, and well protected against accidents arising from the ordinary effects of the elements in which it is to be used. Marcy *v.* Sun Mut. Ins. Co., 11 La. Ann. 748.

[3] Knill *v.* Hooper, 2 H. & N. 277.

This warranty is strictly a condition precedent to the obligation of insurance; if it be not performed, the policy does not attach; and if this condition be broken, at the inception of the risk in any way whatever and from any cause whatever, there is no contract of insurance, the policy being wholly void.[1] Such is the general principle; but it receives in practice qualifications and modifications which will now be considered.

In the first place it should be stated that this sea-worthiness is not an absolute requirement of the law; it may be waived or modified in any way by the parties. Thus, they may doubtless agree that the ship shall be insured whether sea-worthy or not;[2] or that any unseaworthiness, not known to the insured, shall not affect his insurance;[3] but without such a clause the policy is just as much avoided by any actual unseaworthiness which

[1] Tidmarsh *v.* Washington F. & M. Ins. Co., 4 Mason, 439; Small *v.* Gibson, 16 Q. B. 128, 3 Eng. L. & Eq. 290, 305, per *Parke*, B.; Wallace *v.* De Pau, 2 Bay, 503, 1 Brev. 252.

[2] In Parfitt *v.* Thompson, 13 M. & W. 392, the underwriters agreed to consider the vessel sea-worthy for the voyage. It was contended by the underwriters that this admission merely precluded them from contesting the fact of her sea-worthiness, in case the loss had happened from the perils of the sea, but that if the loss took place in consequence of her unseaworthiness, they were at liberty to take advantage of that fact as a ground for non-payment of the sum insured. But *Pollock*, C. B., in delivering the opinion of the court, said: "I cannot assent to the construction of the defendant's admission of sea-worthiness, which has been contended for. It seems to me that that admission enures for all purposes, and amounts to a dispensation of the usual warranty of sea-worthiness. I cannot think the parties intended, that, if the unseaworthiness alone were the cause of the loss, the plaintiff should have no right to recover. It appears to me, that, if the vessel had foundered in a perfectly calm sea, from a leak occasioned by rottenness, on the day after the policy was effected, the underwriters would have been held liable." See also, Phillips *v.* Nairne, 4 C. B. 343. As to what constitutes a waiver of the implied warranty of sea-worthiness it has been held, that a survey of the vessel for the underwriters, by their agent does not. Danson *v.* Cawley, Newfoundland Cas. 433; Myers *v.* Girard Ins. Co., 26 Penn. State, 192. In this last case it was also decided that the fact that the underwriters knew that the vessel was destined for a particular trade, would be no waiver, and the court said: "All the authorities establish that a waiver of sea-worthiness, when not expressed in the contract of insurance, is only to be inferred upon clear evidence that the insurer knew that the vessel was unfit to perform the voyage insured, or that a full representation was made by the assured of the defects of the ship before the completion of the contract." It has been questioned whether advertising to insure goods by particular boats is a waiver of sea-worthiness as to them. Natchez Ins. Co. *v.* Stanton, 2 Smedes & M. 340.

[3] Vallejo *v.* Wheeler, Cowp. 143.

neither was known nor could be known to the insured, as if it were known to, or caused by him.[1]

If the insurance is at and from a port, there is no implied warranty in the nature of a condition precedent, that the vessel shall be sea-worthy when she leaves port, but only that she was in a suitable state for the policy to attach, when the risk commenced.[2]

How far this obligation of sea-worthiness extends neither is, nor ever can be settled by positive definition or rules of law, for the reason that improvements and changes in navigation frequently require new implements, or new forms of old ones, and these, though not necessary at first, become so, when there is an established usage, that all ships of a certain quality, or those to be sent on certain voyages, or used for certain purposes shall have them. Thus food, water, fuel, and lights are always necessary; and they must be sufficient in quantity and quality.[3] But a non-compliance with the provisions of a statute requiring the carrying of a certain quantity of water under deck, does not of itself render the vessel unseaworthy.[4] Whether a medicine chest,[5] or a chronometer, is necessary, must depend upon the ship

[1] Lee *v.* Beach, Park on Ins. 297, Marsh. on Ins. 160; Oliver *v.* Cowley, Park on Ins. 298, Marsh. on Ins. 160; Douglas *v.* Scougall, 4 Dow, 269, 276; Warren *v.* United Ins. Co., 2 Johns. Cas. 231; Dupeyre *v.* Western Mar. & F. Ins. Co., 2 Rob. La. 457; Porter *v.* Bussey, 1 Mass. 436. In Douglas *v.* Scougall, Lord *Eldon* laid down the law as follows: "It is not necessary to inquire whether the owner acted honestly and fairly in the transaction, for it is clear law that, however just and honest the intentions and conduct of the owner may be, if he is mistaken in the fact, and the vessel is in fact not sea-worthy, the underwriter is not liable."

[2] Taylor *v.* Lowell, 3 Mass. 331; Merchants' Ins. Co. *v.* Clapp, 11 Pick. 56; Garrigues *v.* Coxe, 1 Binn. 592; M'Lanahan *v.* Universal Ins. Co., 1 Pet. 170. See also, Annen *v.* Woodman, 3 Taunt. 299; Weir *v.* Aberdeen, 2 B. & Ald. 320. But in Knill *v.* Hooper, 2 H. & N. 277, where insurance was effected on a vessel "at and from Terceira" to a port in the United Kingdom, a plea that the vessel was unseaworthy when she sailed on the voyage was held good. The Court, however, seem to have considered the case as if the insurance had been "from" the port. The main point of the case is stated ante, p. 132, n. 3.

[3] Fontaine *v.* Phœnix Ins. Co., 10 Johns. 58; Moses *v.* Sun Mutual Ins. Co., 1 Duer, 159. And they must be sufficient in quantity for the whole voyage, even though the vessel has permission to stop at an intermediate port. Kettell *v.* Wiggin, 13 Mass. 68.

[4] Warren *v.* Manufacturers' Ins. Co., 13 Pick. 518.

[5] Woolf *v.* Claggett, 3 Esp. 257.

and the voyage. So anchors, cables,[1] and sails and cordage,[2] ballast,[3] and storage of cargo,[4] officers and crew, or pilotage,[5] sufficient at one time, are not so at another.

The requirement of sea-worthiness extends especially, and in all particulars, to the officers and crew of a ship;[6] and our notes

[1] Wilkie *v.* Geddes, 3 Dow, 57. In this case the best bower anchor and the cable of the small bower were defective.

[2] Wedderburn *v.* Bell, 1 Camp. 1, where the maintop-gallant-sail, and the studding-sails were so rotten that the vessel fell behind her convoy and was lost.

[3] Deblois *v.* Ocean Ins. Co., 16 Pick. 303. See Dixon *v.* Sadler, 5 M. & W. 405.

[4] Chase *v.* Eagle Ins. Co., 5 Pick. 51.

[5] See post, p. 143, n. 1.

[6] Hunter *v.* Potts, Selw. N. P., 11th ed., 1017, n.; Forshaw *v.* Chabert, 3 Brod. & B. 158. In Walden *v.* N. Y. Firem. Ins. Co., 12 Johns. 128, 136, the court said: "The assured shall, in good faith, employ a captain of competent nautical skill, and general good character." If, therefore, a captain is so ignorant of the coast that he puts into one port instead of another, whereby he is captured, the vessel is considered as unseaworthy. Tait *v.* Levi, 14 East, 481. This implied warranty has been carried very far in the late case of Draper *v.* Comm. Ins. Co., 4 Duer, 234. The defence was, that at the commencement of the risk the vessel was unseaworthy owing to the incompetency of the master and the insufficiency of the crew. The vessel had formerly been owned by foreigners, and commanded by one McNeil, a British subject. After she became the property of her American owners, one Greene was appointed master, and his name appeared on the registry as such. He also signed the shipping articles, bills of lading, etc. Greene had never been to sea, and it was not intended that he should take any part in the navigation of the vessel, but he was to act as supercargo only. McNeil, who was in every respect a competent person, was hired as the sailing-master, and had the exclusive command of the vessel. The court held, that the vessel was not sea-worthy on account of the incompetency of her captain, Greene.

In Dow *v.* Smith, 1 Caines, 32, it was held, that the captain and one hand were not sufficient for a voyage from New York to Edenton, in a vessel of thirty-five to forty tons burden. In Silva *v.* Low, 1 Johns. Cas. 184, the voyage was from Wilmington, N. C., to Falmouth, and at and from thence to a port of discharge in Great Britain. The vessel sailed with the intention of taking in more seamen at New York, but was lost before arriving at the point where the course to New York diverged from that to Falmouth. The court held, that this intention to deviate showed either that there was not a sufficient number of men on board when the vessel left Wilmington, or else that they were shipped merely to New York, and in either case the implied warranty was broken. If a vessel is insured at and from a port to another, and while at the first port she loses some of her crew, and they cannot be replaced there, she may go to the nearest port to obtain more; and the fact that when she left the port she was not in a sea-worthy condition to perform the whole voyage, is no defence. Cruder *v.* Phil. Ins. Co., 2 Wash. C. C. 262. But if the vessel was unseaworthy for the voyage when the risk commenced, she cannot go out of her course to supply such deficiency. Cruder *v.* Penn. Ins. Co., 2 Wash. C. C. 339. It was held, in Hucks *v.* Thornton, Holt, N. P. 30, that where a vessel is insured on a retrospective policy while at sea, it is sufficient if at the time she has a large enough crew to enable her to pursue any part of her adventure, and it is not necessary that the crew should be sufficient for all the undertaking

will show that it has been deemed an interesting question, how far it is necessary to have officers on board competent in case of an emergency to fulfil the duties of a superior station.[1]

A winter voyage requires a different preparation from a summer voyage;[2] a long one from a short one; and in general

contemplated when the vessel first set sail. In Busk *v.* Royal Exch. Ass. Co., 2 B. & Ald. 73, it was admitted that it was sufficient for the mate alone to have charge of a vessel while frozen up during the winter; and the question as to the liability of the underwriters, in case the vessel had been unseaworthy through the negligence of the crew, was not decided, though *Bayley*, J., said: "The owner certainly is bound in the first instance, to provide the ship with a competent crew, but he does not undertake for the conduct of that crew in the subsequent part of the voyage."

[1] In Clifford *v.* Hunter, 3 Car. & P. 16, Moody & M. 103, Lord *Tenterden*, C. J., expressed a strong opinion that a vessel, on a voyage from Madras to London, was not sea-worthy unless she had some one on board besides the captain who was capable of navigating her to England. A similar question came up in the case of Gillespie *v.* Forsyth, before the Court of Queen's Bench at Quebec, 2 Law Reporter, 257. The case is the more worthy of notice from the fact that the opinions of Chancellor *Kent*, Professor *Greenleaf*, and the then Attorney-General of England, Sir *J. Campbell*, are published in connection with it. The vessel was insured from Quebec to Montego Bay in the Island of Jamaica, and back to Quebec. On the arrival of the vessel at Montego Bay the supercargo discharged the master, and had his own name indorsed on the register as master. But, previous to the sailing of the vessel, one Dixon, who had been the mate, was appointed master, and his name was indorsed on the register, and one of the seamen was appointed mate in his place. This person was an able seaman, but could not write, and Dixon was the only person on board capable of navigating the vessel. Diligent search was made, but no person possessing the requisite qualifications could be obtained. The jury found that, considering the nature of the voyage, the vessel was sea-worthy when she left Montego Bay.

Chancellor *Kent* was strongly of the opinion that the right of the owner to change the master was unquestionable, provided a substitute of competent skill was obtained, citing Walden *v.* N. Y. Firem. Ins. Co., 12 Johns. 128, 136. But if we admit this right, yet if it was necessary that both the master and mate should understand the science of navigation, and the owner, or his agent, should dispossess the master and put the mate in his place, and then be unable to find a competent person to fill the mate's place, would not the underwriters have a good defence?

The finding of the jury in the above case was in accordance with the ruling of the court in Treadwell *v.* Union Ins. Co., 6 Cow. 270, where it was held, that a vessel on a voyage from North Carolina to New York, with a captain who did not understand the science of navigation, was sea-worthy, if the nature of the voyage were such that this knowledge was not required. It was held, in the case of Copeland *v.* New England Mar. Ins. Co., 2 Met. 432, that where a vessel was insured on a voyage out and home, and while at the foreign port the captain became insane, and continued to be in that condition when the vessel sailed, the vessel was sea-worthy though a captain might have been procured at the foreign port. This decision proceeds on the ground that the mate was a competent person, and should have taken the captain's place. We shall have occasion to refer to this case hereafter. See post, p. 141, note.

[2] Watt *v.* Morris, 1 Dow, 32.

whether any particular thing is necessary, is determined very much from usage, and from the reason of the case.[1]

The ship must also be properly constructed of proper materials, and in these respects, as in others, adapted to the risk assumed,[2] and must be properly loaded, not only as to the storage of the goods, but regard must be had to their weight and quantity.[3]

The policy, we have seen, does not attach to an unseaworthy ship; but if the ship be sea-worthy and the policy attaches, this implied warranty loses its character of a condition precedent, for if a subsequent breach occurs of a nature to discharge the underwriters for a subsequent loss occasioned by it, they would still be liable for a loss occurring previous to the breach.[4] If there be a deficiency at the commencement of the risk amounting then to unseaworthiness, so that the policy does not then attach in the sense that if a loss occurs the insurers are liable, yet if this deficiency be temporary, capable of speedy and effectual remedy, and is in fact soon remedied, it has been said that the policy may attach as soon as the vessel becomes sea-worthy.[5] As sea-

[1] In all such cases the question is one of fact for the jury. Chase *v.* Eagle Ins. Co., 5 Pick. 51; Bell *v.* Reed, 4 Binn. 127; Clifford *v.* Hunter, Moody & M. 103, 3 Car. & P. 16; Gillespie *v.* Forsyth, 2 Law Reporter, 257; M'Lanahan *v.* Universal Ins. Co., 1 Pet. 170, 184.

[2] Thus a vessel for a foreign voyage must be built with knees. Watt *v.* Morris, 1 Dow, 32; Parker *v.* Potts, 3 Dow, 23, 32. In a Pennsylvania case the question arose whether a vessel, employed in the navigation of Lake Erie, was unseaworthy which had sliders substituted in the place of cabin doors and no tarpawling covering for the hatches. The jury having found that these were not necessary, the court refused to set aside the verdict. Bell *v.* Reed, 4 Binn. 127. If the timbers are decayed and the iron-work loose, the vessel is unseaworthy. Douglas *v.* Scougal, 4 Dow, 269.

[3] Weir *v.* Aberdeen, 2 B. & Ald. 320. It has been said, that whether a vessel is overloaded or not, depends upon the capacity of the vessel, and not upon the depth of water over the shoals and bars in the river upon which she is to be navigated. Cin. Mut. Ins. Co. *v.* May, 20 Ohio, 211. But if the vessel was destined to sail on that river, surely the peculiar exigencies of the river must be considered and prepared for.

[4] See ante, p. 108, n. 1.

[5] This doctrine seems to be supported by *Abbott*, C. J., in Weir *v.* Aberdeen, 2 B. & Ald. 320. The insurance was on the vessel and her outfit at and from London to Bahia. The vessel sailed from London in an unseaworthy condition from being overloaded, and was obliged to put back to the Downs. Application being made to the underwriters, it was agreed that the vessel might discharge part of her cargo at Ramsgate. This was done, and the vessel sailed from R. in a sea-worthy condition. It was contended that as the vessel sailed in an unseaworthy condition from London the policy was void. *Abbott*, C. J., said: "That proposition would go the length of establishing, that if a vessel, at the outset of her voyage, be by mistake or accident unseaworthy,

worthiness is a condition precedent to the right of the assured to recover, it would seem to belong to him to establish that fact, and so it has been held.[1] Now, however, the law is different in many of the States.[2] But if the vessel springs a leak soon after

owing to some defect, which is immediately discovered and remedied before any loss happens in consequence of it, still that the policy would be void, and the underwriters not liable. I confess that I was a little surprised at that proposition, because, if true in point of law, I fear that we should find many cases indeed where it would turn out that the assured could have no claim upon the underwriters, because something was wanting or something excessive, at the instant of the ship's departure, although the want had been supplied, or the excess removed before the loss happened." Mr. Justice *Story*, in M'Lanahan *v.* Universal Ins. Co., 1 Pet. 170, 184, speaking of the language of *Abbott*, C. J., said: "This is an important doctrine, and well worthy of discussion, whenever it comes directly in judgment." Though the language of *Abbott*, C. J., was very strong, yet we think the learned judge did not intend to rest the case upon the fact alone of the sea-worthiness of the vessel being restored, but rather on the fact that the underwriters had waived the objection by allowing the vessel to unload at Ramsgate. This is shown by the case supposed of a vessel sailing with only one anchor and afterwards taking on board another by the consent of the underwriters. No distinction was taken in this case between a policy "from a port," and "at and from" one. The *dictum* of *Story*, J., in United States *v.* Hunt, 2 Story, 120, 125, seems hardly to justify the inference drawn from it by Mr. Phillips. In Deblois *v.* Ocean Ins. Co., 16 Pick. 303, the defect did not exist at the commencement of the voyage, but the vessel was unseaworthy between two intermediate ports, and was rendered seaworthy before the loss took place. The same may be said of Chase *v.* Eagle Ins. Co., 5 Pick. 51. The case of Stanwood *v.* Rich, Sup. Jud. Ct., Mass., cited 1 Phillips, Ins. § 701, 726, is not stated sufficiently at length to enable one to determine how far it is to be received as an authority. It appears to have been merely a *nisi prius* case. The cases of Taylor *v.* Lowell, 3 Mass. 331, and Merch. Ins. Co. *v.* Clapp, 11 Pick. 56, were cases of insurance "at and from," and were not decided on the ground that the defect was remedied after the voyage had commenced. We have mentioned these cases because they are cited by Mr. Phillips in his valuable work on Insurance, and, therefore, it seems fit that the attention of the reader should be called to them, but they do not seem to us to support the principle contended for, and which is, we think, directly opposed to the well-settled rule that if the vessel is unseaworthy at the commencement of the risk, the policy never attaches and the underwriters are discharged; and are not merely an exception to that rule. In M'Millan *v.* Union Ins. Co., Rice, 248, it was held, that the implied warranty applies only to that which is to continue for the whole voyage, and, therefore, where a vessel sailed without a pilot, and was lost after she passed the pilotage ground, the underwriters were held liable.

[1] Tidmarsh *v.* Wash. F. & M. Ins. Co., 4 Mason, 439; Craig *v.* United States Ins. Co., Pet. C. C. 410; Moses *v.* Sun Mutual Ins. Co., 1 Duer, 159.

[2] Thus, in Deshon *v.* Merchants' Ins. Co., 11 Met. 199, 207, *Hubbard*, J., said: "But a usage has existed in this commonwealth for a long course of years, that although the sea-worthiness is a matter of warranty on the part of the assured, and must necessarily be complied with, yet he is not called upon, *in limine*, to give evidence of his having complied with it. It is assumed as a fact in the absence of fraud, and he has the benefit of the presumption." See also, Taylor *v.* Lowell, 3 Mass. 331; Paddock *v.*

sailing, without having met with any peril, this raises a presumption that she was unseaworthy when she sailed.[1] But this presumption may be rebutted by proof that she was actually sea-worthy when she sailed.[2] And when a vessel is shown to have met with a sea peril, if the insurer claims that the damage was owing to her being unseaworthy, and not to the sea peril, the burden is on him to show this.[3] And if the vessel sails and is never heard from, the fact of her sea-worthiness is presumed, in the absence of evidence to the contrary.[4]

If, after the risk has commenced, she becomes unseaworthy by reason of an accident or peril, then the policy continues to attach, until she can again, by reasonable endeavors, be restored to a sea-worthy condition. It is, indeed, the duty of the master, for which the owner is responsible, not only to do all that can be done to prevent her unseaworthiness, but to do all that should be done to restore her sea-worthiness. If, therefore, she is disabled at sea, though she remains covered by the policy until she reaches a port, she must leave that port, wherever it may be, in a sea-worthy condition, provided she can there be made sea-worthy. And analogy of reason would require that a master, finding his ship unseaworthy at sea, should make, not necessarily at once for the nearest port, but for a port of repair, without unnecessary delay, because otherwise he would expose the vessel to unreasonable and unnecessary danger. So, too, if the unseaworthiness could, without great sacrifice, be cured at sea,

Franklin Ins. Co., 11 Pick. 227; Watson *v.* Clark, 1 Dow, 336; Parker *v.* Potts, 3 Dow, 23; Bullard *v.* Roger Williams Ins. Co., 1 Curtis, C. C. 148; Snethen *v.* Memphis Ins. Co., 3 La. Ann. 474; Dupeyre *v.* West. M. & F. Ins. Co., 2 Rob. La. 457.

[1] Monro *v.* Vandam, Park, Ins. 289, n.; Mills *v.* Roebuck, Marsh. Ins. 161; Watson *v.* Clark, 1 Dow, 336, 344; Parker *v.* Potts, 3 Dow, 23; Douglas *v.* Scougall, 4 Dow, 269; Talcot *v.* Commercial Ins. Co., 2 Johns. 124; Barnewall *v.* Church, 1 Caines, 217; Cort *v.* Delaware Ins. Co., 2 Wash. C. C. 375; Paddock *v.* Franklin Ins. Co., 11 Pick. 227, 237; Deshon *v.* Merchants' Ins. Co., 11 Met. 199, 207; Myers *v.* Girard Ins. Co., 26 Penn. State, 192; Prescott *v.* Union Ins. Co., 1 Whart. 399; Bullard *v.* Roger Williams Ins. Co., 1 Curtis, C. C. 148; Fleming *v.* Mar. Ins. Co., 3 Watts & S. 144, 153; Marcy *v.* Sun Mut. Ins. Co., 11 La. Ann. 748; Dupeyre *v.* Western M. & F. Ins. Co., 2 Rob. La. 457; Hudson *v.* Williamson, 3 Brev. 342; Wallace *v.* De Pau, 2 Bay, 503, 1 Brev. 252. But see Patrick *v.* Hallett, 1 Johns. 241.

[2] Snethen *v.* Memphis Ins. Co., 3 La. Ann. 474; Rugely *v.* Sun Mut. Ins. Co. of N. Y., 7 La. Ann. 279.

[3] Barnewall *v.* Church, 1 Caines, 217.

[4] Deshon *v.* Merchants' Ins. Co., 11 Met. 199, 207.

by help from another vessel, it should be the master's duty to obtain this help. Whether, or when the insurers are discharged by the master's non-fulfilment of such duties, is a more difficult question. On the one hand, although the misconduct or neglect of the officers and crew are not among the dangers against which the owner is insured, yet if the subject-matter insured be lost by a peril caused by such negligence, the underwriters are held liable therefor. On the other hand, the master is the representative and agent of the owner; with power and authority, and it is his duty to fulfil for him this warranty of sea-worthiness, and a breach of it by such an agent is a breach by the principal. Perhaps no better answer, or none, which more nearly reconciles the conflicting authorities, can be given, than that the decision of the question must depend upon whether the person in command of the ship, then acts only in discharge of his personal duties as master, or mate, or acts, or ought to act, as the representative and agent of the master. And, generally, the conclusion would be, that if the ship be sea-worthy in the beginning, a subsequent unseaworthiness, caused by negligence or error of officers or crew, does not take away the responsibility of the insurers. Leaving it still as a rule of law, that it is a duty of the master to repair unseaworthiness in the first port, the disregard of which is a breach of the warranty by the owner.[1]

[1] We shall see hereafter that as the law now stands an underwriter is liable for a loss by a peril insured against, although that peril was caused by the negligence of the master and crew. But if a vessel becomes unseaworthy and afterwards leaves an intermediate port in that condition, although she might have been repaired there, and is lost in consequence of that neglect on the part of the captain to repair her, it is well settled that the underwriters are not held liable. Paddock *v.* Franklin Ins. Co., 11 Pick. 227; Hazard *v.* New England Mar. Ins. Co., 1 Sumner, 218, 230, 8 Pet. 557; Deblois *v.* Ocean Ins. Co., 16 Pick. 303, 308; Stewart *v.* Tenn. Mar. & F. Ins. Co., 1 Humph. 242. In Dupeyre *v.* Western Mar. & F. Ins. Co., 2 Rob. La. 457, a steamboat insured, had a cold water pump to supply her boilers with water. This being out of repair the engineer took it out and put in a plug in such a negligent manner that, while the boat was lying in still water, she suddenly sunk. The underwriters were held not to be liable. But the captain must have reasonable cause to suspect the existence of the defect while in the intermediate port, and if he is not aware of it, or if he knows it, but has reasonable ground to believe that the vessel can proceed in safety, the underwriters are liable, although the vessel was not in a sea-worthy condition when she left port. Starbuck *v.* New England Marine Ins. Co., 19 Pick. 198. To reconcile these cases with the doctrine that the underwriters are liable for a loss by a peril insured against, consequent on the negligence of the master or crew, a distinction has been made between the negligence of the master when on land, and when at sea. Thus, *Shaw*, C. J.,

It must, however, still be remarked, that this breach does not always and necessarily discharge the underwriters, but only suspends their liability. Thus, if a ship loses her anchor in a port where she can get no other, or loses her boat at sea, or loses some of her crew; and reaches a port where these wants could be supplied, but leaves it without supplying them, and proceeds to another port and there supplies them, and so becomes again sea-worthy, the liability of the insurers revives. It was so far suspended during the interruption of the sea-worthiness, that if a

in Copeland *v.* New England Mar. Ins. Co., 2 Met. 432, 443, after citing the language of Baron *Parke*, in Dixon *v.* Sadler, 5 M. & W. 405, that "if the vessel, crew, and equipments be originally sufficient, the assured has done all that he contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew," says: "If this is to be taken as limited to the cases where the master, officers, and crew act in their own proper sphere, as practically managing and conducting the navigation, and where the master does not stand in the relation of representative and agent of the owners, we think it not inconsistent with the general principle, leaving the owner still bound by the acts of the master, so far as by law and the usage of navigation he is the representative of the owners, executing their express or implied orders, and doing all such acts as an owner himself might and would do, if present. Unless taken with this implied limitation, the principle would seem to be laid down too broadly, and come in conflict with some of the established rules of insurance law." In England it seems now to be held, that negligence of the master and crew, or persons employed to load the vessel at an intermediate port will not exonerate the underwriters, although she is lost in consequence of such negligence. Redman *v.* Wilson, 14 M. & W. 476. Notwithstanding the language of *Shaw*, C. J., in Copeland *v.* New England Mar. Ins. Co., it is difficult to ascertain on what ground the case was decided other than that laid down in the English authorities. The case may be briefly stated as follows: The vessel was at an intermediate port under the command of an insane captain. The mate was competent to take charge of the vessel but omitted to do so, and also neglected to procure another captain, although one might have been obtained. The vessel sailed in this condition, and was lost in consequence of it. The court held, that the vessel was sea-worthy at the intermediate port, and that as the loss was caused by the neglect of the mate to take command, the underwriters were liable. It may be well to state, before proceeding to comment on this case, that the court at the time consisted of but four judges, and that one, Mr. Justice *Wilde*, dissented. The decision was, therefore, by a bare majority; and we think it was incorrect in deciding that the vessel was sea-worthy when she left port. The court said: "If the vessel had an officer on board competent to command, and whose duty it was to command, the vessel could not be deemed unseaworthy." It was not denied that it was the duty of the mate to have taken the command, and the only question was as to the consequences of such neglect on his part. If repairs had been needed for the ship and the mate had neglected to procure them, and the vessel had consequently been lost, would not the underwriters have been discharged, and how can this case be distinguished from the one in point? The distinction seems to us to be more subtle than just, and it illustrates the impossibility of an uniform application of the rule, *causa proxima non remota spectatur*, which rule we shall consider hereafter.

loss had happened in that interval, that is, after the master could have supplied her wants, and before he did supply them, and this loss happened by reason of the insufficiency or unseaworthiness of the ship, the underwriters would not have been liable.

The general principles of the law of insurance might seem to lead to the conclusion, that they should still be liable for a loss happening during that interval from any cause in no way connected with the unseaworthiness thus not repaired, on the ground that the warranty of seaworthiness was no longer a condition precedent; but the policy, or obligation for indemnity having once attached, the correlative obligation of sea-worthiness continues, but will not discharge the insurers from a loss not attributable to the non-fulfilment of that obligation.[1]

As it is essential that a sufficient crew should be shipped at the beginning of the voyage,[2] so it may be requisite that the crew should be shipped for the whole voyage; and this must depend, like most questions of this kind, upon the usage, and the nature of the voyage. It may be the case, that arrangements have been made, or can with sufficient probability be made, to supply at some intermediate port any deficiency which may occur there in the crew; and if so it would seem to be enough if the crew be shipped to that port.[3]

So as to pilotage; the ship is unseaworthy if she is without a

[1] Thus in Paddock *v.* Franklin Ins. Co., 11 Pick. 227, 234, *Shaw*, C. J., said: "It would seem to be more consistent with the nature of the contract, the intent of the parties, and the purposes of justice and policy, to hold, that after the policy has once attached, the implied warranty should be so construed, as to exempt the underwriter from all loss or damage, which did or might proceed from any cause, thus warranted against; but to hold him still responsible for those losses which by no possibility could be occasioned by peril increased or affected by the breach of such implied warranty." See also, Taylor *v.* Lowell, 3 Mass. 331; Merchants' Ins. Co. *v.* Clapp, 11 Pick. 56; Capen *v.* Wash. Ins. Co., Sup. Jud. Ct., Mass., 16 Law Reporter, 465; Starbuck *v.* N. E. Mar. Ins. Co., 19 Pick. 198; Chase *v.* Eagle Ins. Co., 5 Pick. 51; Am. Ins. Co. *v.* Ogden, 15 Wend. 532, 20 Wend. 287; Peters *v.* Phœnix Ins. Co., 3 S. & R. 25; Hazard *v.* N. E. Mar. Ins. Co., 1 Sumner, 218, 230.

[2] Caldwell *v.* Western Mar. & F. Ins. Co., 19 La. 42. It was held in this case, that, although a competent crew is necessary at the commencement of the voyage, yet the insurers are liable notwithstanding one of the crew was absent, if he could not have averted the loss had he been present. But this cannot be correct as a general principle of law.

[3] Forshaw *v.* Chabert, 3 Brod. & B. 158; Silva *v.* Low, 1 Johns. Cas. 184. See ante, p. 135, n. 6.

pilot, where usage and the reason of the case require that she should have one, whether in entering or leaving a port.[1] If a pilot be necessary, and a person falsely representing himself as one, is in good faith and without gross negligence received as such, there is no breach of the warranty of sea-worthiness;[2] nor is there, if the master or some one else on board can direct the ship over the pilotage grounds, and has sufficient skill to perform the duty as a pilot should perform it.[3] Nor should we say,

[1] According to the principles laid down in the late English cases, it appears that if a pilot be properly taken at the commencement of a voyage, no subsequent neglect of the master in not taking a pilot will discharge the underwriters, unless, perhaps, where one is required by act of parliament. See ante, p. 140, n. 1. Per *Parke*, B., in Gibson *v.* Small, 4 H. L. Cas. 353, 24 Eng. L. & Eq. 16, 36; Dixon *v.* Sadler, 5 M. & W. 405, 415, 8 M. & W. 895. The exception of the case where a pilot is required by an act of parliament, rests entirely upon the authority of Law *v.* Hollingsworth, 7 T. R. 160. But that case has been questioned by *Parke*, B., in Dixon *v.* Sadler, 5 M. & W. 415, and by *Tindal*, C. J., in the same case, 8 M. & W. 895. In Phillips *v.* Headlam, 2 B. & Ad. 380, Lord *Tenterden* said: "It may be conceded, that a vessel coming out of a harbor must have a pilot, because the captain has it in his power always to procure one." But this, unless limited to the commencement of the voyage, seems to be inconsistent with the law as laid down by *Parke*, B., in Gibson *v.* Small, 4 H. L. Cas. 353, 24 Eng. L. & Eq. 16, 36.

In the United States the rule is not perhaps quite settled. See Stanwood *v.* Rich, Sup. Jud. Ct., Mass., cited 1 Phillips on Ins. § 715. In Keeler *v.* Firemen's Ins. Co., 3 Hill, 250, the vessel was sailing up the Potomac without a pilot, and was lost by running ashore. It was shown that it was customary for vessels of that size to ascend the river without pilots, and that the mate was competent to take the vessel up the river. It was held that the insurers were liable. This was a time policy, and the neglect to take a pilot was after the commencement of the voyage, but the court seemed to be of opinion that the underwriters would have been discharged had the custom of the place and the nature of the navigation required one. In M'Millan *v.* Union Ins. Co., Rice, 248, in sailing from a port where it was customary to take a pilot, none was taken, and afterwards the vessel was lost, from causes not attributable to the want of a pilot. The underwriters were held liable. And the case was said to depend entirely on the question whether the loss was or was not to be attributed to the not having a pilot. See also, De Pau *v.* Jones, 1 Brev. 437; Flanigen *v.* Washington Ins. Co., 7 Barr, 306; Whitney *v.* Ocean Ins. Co., 14 La. 485.

From these cases it seems to be doubtful whether the want of a pilot would, in any case, constitute such unseaworthiness as would avoid a policy *in toto*; certainly it would not, unless the neglect were at the commencement of the risk. Probably, it would be held generally, as in the case of M'Millan *v.* Union Ins. Co., that the underwriters would be discharged only from losses arising from the want of a pilot.

[2] Law *v.* Hollingsworth, 7 T. R. 160, per Lord *Kenyon*, C. J.

[3] Keeler *v.* Firemen's Ins. Co., 3 Hill, 250; Flanigen *v.* Washington Ins. Co., 7 Barr, 306; M'Millan *v.* Union Ins. Co., Rice, 248. But see *contra*, Whitney *v.* Ocean Ins. Co., 14 La. 485. But it rests with the assured to show the competency of the officer who has acted as pilot.

on general principles, that the neglect to receive a pilot where one was required to be taken by a law of the port, *necessarily* made the ship unseaworthy.[1]

The standard of sea-worthiness varies at different places, and, in general, that must be taken which rules at the place where the vessel belongs.[2]

So, too, this standard varies according to the character of the vessel,[3] her location, the voyage she is to undertake, or the service she is to perform.[4] Thus, if she is in port, she may be sea-worthy for that place, although not for sea.[5] If on

[1] In Flanigen *v.* Washington Ins. Co., 7 Barr, 306, the statute required a pilot to be taken or a sum of money to be paid. It was held that the statute did not affect the question of sea-worthiness, but that it still depended upon usage and the nature of the navigation. But see ante, p. 143, n. 1, as to English rule.

[2] Tidmarsh *v.* Wash. F. & M. Ins. Co., 4 Mason, 439, 442. In this case insurance was made in Boston upon a British vessel belonging to the port of Halifax in Nova Scotia. It was held, that the Halifax standard of sea-worthiness was to be taken. See also, Cobb *v.* New England Mutual M. Ins. Co., 6 Gray, 192, 200.

[3] This principle, as applied to steam vessels, requires not only that the hull shall be staunch, tight, and strong, but that the machinery shall be properly constructed, and of sufficient power to perform the contemplated voyage. Myers *v.* Girard Ins. Co., 26 Penn. State, 192. See, as to floating docks, Marcy *v.* Sun Mut. Ins. Co., 11 La. Ann. 748, cited ante, p. 132, n. 2.

[4] Cobb *v.* New England Mutual M. Ins. Co., 6 Gray, 192; Knill *v.* Hooper, 2 H. & N. 277; Alexander *v.* Pratt, 1 Arnould, Ins. 669; Small *v.* Gibson, 16 Q. B. 141, 3 Eng. L. & Eq. 299, 303; Brown *v.* Girard, 4 Yeates, 115.

[5] Thus, in M'Lanahan *v.* Universal Ins. Co., 1 Pet. 170, 184, the court said: "Sea-worthiness in port, or for temporary purposes, such as mere change of position in the harbor, or proceeding out of port, or lying in the offing, may be one thing, and sea-worthiness for a whole voyage quite another. A policy on a ship at and from a port will attach, although the ship be at the time undergoing extensive repairs in port, so as in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy." And *Gibbs*, C. J., speaking of a vessel in port, said: "She need have no other men on board than such as are necessary to prevent fire or the like accidents, no sails, provisions, or equipment are necessary." Abitbol *v.* Bristow, 6 Taunt. 464. See also, Cruder *v.* Phil. Ins. Co., 2 Wash. C. C. 262; Annen *v.* Woodman, 3 Taunt. 299; Oliverson *v.* Longhman, cited 2 B. & Ald. 322; Smith *v.* Surridge, 4 Esp. 25; Motteux *v.* Lond. Ass. Co., 1 Atk. 545; Forbes *v.* Wilson, Park, Ins. 299, note; Taylor *v.* Lowell, 3 Mass. 331; Paddock *v.* Franklin Ins. Co., 11 Pick. 227, 232; Ingraham *v.* South Carolina Ins. Co., 2 Const. R. 707. In Parmeter *v.* Cousins, 2 Camp. 235, the vessel was insured "at and from St. Michaels to England." When she arrived at St. Michaels she was leaking badly, and in an unfit condition to take in a cargo, and in great danger from a storm which was then raging. After remaining at anchor over twenty-four hours she was driven to sea and wrecked. The insurers were held not to be liable. Lord *Ellenborough* said: "While the ship remains *at* the place, a state of repair and equipment may be sufficient, which would constitute unseaworthiness after

the ways for repair, she may be fit and sufficient for that condition, although she would not be fit to be water-borne. So, too, the insurance may be for a mere temporary purpose; as the going from one harbor to another,[1] or even across a harbor, or a strait, or a brief navigation upon inland waters;[2] and if the ship be sufficient for this service, it will not be necessary that she should be in a condition to go to sea. And if there be insurance on ship and goods, while in port, that on the ship may be valid, because she is in a sufficient condition for a ship in port, and that on the goods be invalid, because the ship is not in a proper condition to receive goods on board. The policy may, as we think, in such a case, attach at once to the ship, but not on cargo or freight, until the ship becomes sea-worthy to receive her cargo and earn her freight. We cannot, however, assert that this is established by the authorities.[3]

If a voyage policy is to attach to the ship while at sea, or in an intermediate port where repairs cannot be made, then the

the commencement of the voyage. But while in port, she must be in such a condition as to enable her to lie in reasonable security till she is properly repaired and equipped for the voyage. She must have been *at* the place in good safety. If she arrives at the outward port so shattered as to be a mere wreck, a policy on the homeward voyage never attaches." See also, Paddock *v.* Franklin Ins. Co., 11 Pick. 227, 232; Cobb *v.* New England Mutual M. Ins. Co. next note.

[1] In Cobb *v.* New England Mutual M. Ins. Co., 6 Gray, 192, insurance was effected on a vessel when water-borne, at and from Perry, with permission to go to Eastport and thence to a southern port. It was held, that it was sufficient if the vessel was in a fit condition to go to Eastport when she sailed for that place, although she was not fit for sea.

[2] Bell *v.* Reed, 4 Binn. 127.

[3] 1 Phillips on Ins. § 723; Cruder *v.* Penn. Ins. Co., 2 Wash. C. C. 339. This doctrine is laid down by Mr. *Phillips*, and is, it appears to us, in accordance with general and recognized principles. But the cases of Taylor *v.* Lowell, 3 Mass. 331, and Merchants' Ins. Co. *v.* Clapp, 11 Pick. 56, hold that in such a case the policy attaches not only to the ship, but to the cargo and freight also. Both of these cases were elaborately argued at the bar by very able counsel, and thoroughly considered by the court with reference to this very point; and they no doubt establish the law in Massachusetts. In Abitbol *v.* Bristow, 6 Taunt. 464, goods were insured at and from Mogadore to London. The declaration averred, that after the loading of the goods on board, the vessel set sail on her intended voyage, and while on the voyage the goods were lost by a peril of the sea. In point of fact the vessel, before she had half her cargo on board, was driven from her moorings by bad weather and lost. The court held, that as a very different degree of sea-worthiness was required while the vessel was in port and while she was at sea, the averment of a loss on the passage required a different declaration and a different state of facts, and the plaintiff was nonsuited.

warranty of sea-worthiness is greatly qualified. It would not be easy, and perhaps not possible, to say, from the present weight of authority, precisely what this qualification is; but we think it may be stated thus. There is a warranty, in such a case, that the ship was fully sea-worthy in the ordinary sense at the original beginning of her voyage; and that she is now sea-worthy, in the sense and degree in which that should attach to her present condition; as, if in a port where perfect repairs can be made, and about to proceed on a voyage, then the warranty of sea-worthiness is much the same as at the beginning; if at sea, then she must be sea-worthy, so far as reasonable care and a proper use of the means within reach can make her so; but as neither party can know where she is, nor what her condition is, the warranty of sea-worthiness, or the condition precedent of sea-worthiness, extends only to this: that she must be in that degree of complete fitness for service, which is proper to the place where she is, and the means of equipment and repair within reach: so that if at sea, and disabled by loss of sails, or a leak, or the death of a part of the crew, and none of these defects or wants could have been remedied before the policy should attach, the policy does, nevertheless, attach, notwithstanding the condition precedent of sea-worthiness. If, however, the ship be at that time a wreck, or so much injured that she cannot be rationally regarded as a subject-matter to which the contract of insurance can attach, then it is as if she were wholly lost, or not in existence, and, of course, there is no insurance upon her.[1]

[1] In Paddock *v.* Franklin Ins. Co., 11 Pick. 227, the insurance was on the cargo of the ship Tarquin, "lost or not lost, now on a whaling voyage in the Pacific Ocean." The ship had been out over three years when the policy was effected. The court held, that the policy related back to the commencement of the risk, and that, if the ship was then sea-worthy, the policy attached. *Shaw*, C. J., however, went on to consider the case in point. He said it might be a matter of doubt whether the rule of sea-worthiness, as a condition precedent, would apply when the policy was to take effect on a particular day in the latter part of a long whaling voyage in distant seas, and intended to cover only the latter portion of such a voyage. He also said that, although the rule would probably be applied, yet it would be with great liberality of construction, and what would be a condition of things in such a stage of the voyage sufficient to satisfy the character of sea-worthiness, would fall far short of that required at its commencement. In Gibson *v.* Small, 4 H. L. Cas. 353, 24 Eng. L. & Eq. 16, 36, *Parke*, B.,

Another question exists as to this implied warranty in case of time policies, which is involved in some difficulty, and perhaps uncertainty; it is, what is this warranty, or condition, in respect to the continuance and maintenance of the sea-worthiness of the vessel. If, for instance, she is insured for a year, must she be in such a condition that she will be sea-worthy during the year, unless she meets with extraordinary peril; so that if she be at the beginning sea-worthy, but in such a state that before the year is out, she must, under ordinary circumstances, need extraordinary repair to keep her sea-worthy, is the policy void? The true answer we take to be this: She must be sea-worthy at the beginning of the time, and this sea-worthiness must be measured by the requirements of the circumstances of her position; one thing if she is then in port, perhaps undergoing repair, another thing if at sea, and so forth; that when she sails on her first voyage she must be sea-worthy in the ordinary sense; and must be kept in repair, and made sea-worthy at every subsequent stage and port, so far as that is reasonably possible, under the penalty of discharging the insurers in case a loss occurs by reason of an unseaworthiness which could have been repaired by the use of proper means. But if the loss is wholly unconnected with this subsequent unseaworthiness, then the insurers are not discharged. Perhaps the reason of the case would suggest another modification of this rule, although it might be difficult to apply it in fact; and that is, if the insurance for a time, say one year, were made with the mutual knowledge and intention that the ship was to pass that year where repairs could not be made nor a port readily reached, as on some of the whaling grounds, then she ought to be, at the outset (on this general principle that the standard of sea-worthiness must always be derived from the voyage to be undertaken), in a sufficient condition not to need repairs during the time. In the note below we have endeavored to give a full

said: "It is undoubted law that there is an implied warranty, with respect to a policy for a voyage, that the ship should be sea-worthy at the commencement of the voyage, or in port when preparing for it, or had been sea-worthy when the voyage insured had been commenced, if the insurance is on a vessel already at sea for the voyage, which voyage being commensurate with the risk insured, the warranty is compendiously described as a warranty of sea-worthiness at the commencement of the risk." See also, the remarks of *Pollock*, C. B., on page 43.

exposition of the law in relation to this interesting and difficult question.[1]

[1] The question, whether there is any implied warranty of sea-worthiness, and if any, what, in a time policy, has lately been the subject of considerable discussion in England. As the later decisions have determined the rule, we deem it only necessary to mention the earlier cases in which there are dicta on the subject, and then we may proceed at once to a consideration of the subsequent ones. The earlier cases are Hucks *v.* Thornton, Holt, N. P. 30; Hollingworth *v.* Brodrick, 7 A. & E. 40; Dixon *v.* Sadler, 5 M. & W. 405, 414; Sadler *v.* Dixon, 8 M. & W. 895. The question arose in the Queen's Bench, in Small *v.* Gibson, 16 Q. B. 128, 3 Eng. L. & Eq. 290, whether there was any warranty of sea-worthiness at the time the risk commenced, or at the making of the policy. Insurance was made on the ship Susan, "lost or not lost," for twelve months, commencing September 25, 1853. The defendant pleaded that the vessel was unseaworthy at the time the policy was made, and on September 25th, when the risk commenced. The Court of Queen's Bench sustained this plea, but it was reversed in the Exchequer Chamber, 16 Q. B. 141, 3 Eng. L. & Eq. 299. The case was then taken by writ of error to the House of Lords, and the decision of the Exchequer Chamber affirmed. 4 H. L. Cas. 353, 24 Eng. L. & Eq. 16. The plea, as stated in 3 Eng. L. & Eq. 299, would seem to show that the defence was taken that the vessel was unseaworthy when she left home on the voyage. That this was not so is shown by the plea, as given in the report of the case before the House of Lords, and by the remarks of *Parke*, B., on this point, 24 Eng. L. & Eq. 42. This question was, however, presented to the judges and by them considered, though they expressly stated that it was not necessary to decide it. In 3 Eng. L. & Eq. 299, 307, *Parke*, B., said: "We are far from saying that there is no warranty of sea-worthiness at all, — so to hold would be to let in the mischief which the law provides against by the implied warranty in a voyage policy, — or that there is not the same warranty in the case of a time policy, according to the situation in which the ship may be at the commencement of the term of the insurance; that is, that the ship is, or shall be, sea-worthy for that voyage, if the ship then be about to sail on a voyage; if in port, that she was in a proper condition for such a port; if she be at sea, that she was sea-worthy when the voyage commenced; in short, that the obligation on the assured is just the same in the time policy as if the service in which the vessel was, or was intended to be engaged, or might be engaged, during the term, was inserted in the policy. If, then, a ship were insured in terms, from a given day, for the remainder of the then voyage to a foreign port and back to England, until another given day, there may be a warranty of sea-worthiness when the voyage commenced." He then said that if the vessel had met with danger, and could have been repaired, but was not, previous to the commencement of the risk, the policy might not attach; and that all the court intended to decide was, that there was no warranty of sea-worthiness wherever the ship might be, or in whatever circumstances placed at the commencement of the term insured.

In the House of Lords the judges stood seven to two on the questions presented by the plea. Lord *St. Leonards* and Lord *Campbell* concurred with the majority. The point in regard to a time policy on a vessel beginning the risk on her departure from her home port, was not discussed by all the judges. Lord *Campbell* was in favor of there not being an implied warranty in any case. Lord *St. Leonards*, on p. 48, and *Martin*, B., thought the same rule would apply to a time, as well as to a voyage contract of insurance. It has since been decided that if a vessel leaves an intermediate

The parties may agree that the vessel shall be sea-worthy when insured on time, as well as when on a voyage, and a rule

port with an insufficient crew, and is lost in consequence thereof, the underwriters are liable, although a crew might have been obtained there. Jenkins *v.* Heycock, 8 Moore, P. C. 351. The court also said: "If it were necessary for the decision of this case, we should be inclined to go to the full extent of what Lord *Campbell* says in the House of Lords." In Michael *v.* Tredwin, 17 C. B. 551, 33 Eng. L. & Eq. 325, the insurance was on the ship "from the meridian of the day of sailing from S. to the meridian of the 20th of March, 1853." The defendant pleaded that the ship was not, at the time of sailing from S. or at any time of the day of sailing from S., or afterwards during the risk, sea-worthy. The court held, that as the defendant did not set forth in his plea that this was a policy to commence at the commencement of a voyage from S., the case came within the most limited operation of the decision in Gibson *v.* Small. Mr. Justice *Cresswell*, during the argument, said: "You say that you claim to treat this as a policy to attach on the commencement of the voyage. Dare you aver that in your plea? If you dare not, why should you have the benefit of a supposed fact which you are not prepared to aver in your pleadings?" And the Court of Queen's Bench, in a subsequent case, have carried the doctrine of there being no implied warranty to the fullest extent. The defendant pleaded, that, at the time when the policy was effected and down to the time of sending the ship to sea, she was an outward bound ship lying in a British port, where the plaintiffs, her owners, resided; that the ship was chartered for a voyage, and that the plaintiffs sent her to sea in an unseaworthy state, and when she was not in a fit condition to go to sea, and that she was afterwards, while on the high seas in that condition, lost. The second plea alleged that the plaintiffs, knowingly, wilfully, wrongfully, and improperly sent the ship out to sea in an unseaworthy state, and when she was not in a fit condition safely to go to sea, and that while she was on the high seas in that condition she was lost. The third plea alleged that the plaintiffs knowingly, wilfully, wrongfully, and improperly sent the ship to sea in an unseaworthy state, and when she was not fitted for the voyage, and when she was not in a fit condition safely to go to sea, and at a time when it was dangerous for her to go to sea in the condition in which she then was, and that the plaintiffs wrongfully and improperly caused and permitted her to be on the high seas in the condition aforesaid, and without a master or proper crew to navigate her on her voyage, during which time, by reason of the premises, she was wrecked and lost. The court held, *Erle*, J., dissenting, that the plaintiff was entitled to judgment on the first and second pleas, and the defendant to judgment on the third, on the ground, not that there was any warranty of sea-worthiness, but that personal misconduct was charged upon the plaintiffs, which misconduct produced the loss. Mr. Justice *Erle* was of the opinion that the defendant was entitled to a verdict on all the counts. Thompson *v.* Hopper, 6 Ellis & B. 172, 34 Eng. L. & Eq. 266. Issue was joined on the third plea, and the court held that the jury should have been instructed to find whether the conduct of the plaintiff in sending the vessel to sea in an improper condition was a cause without which the loss would not have happened. And the instruction having been given that the jury were to say whether the unseaworthiness was the proximate cause of the loss, a new trial was ordered, with liberty to the plaintiff to appeal. 6 Ellis & B. 937, 38 Eng. L. & Eq. 39. The severity of the general rule has been modified to some extent by a subsequent decision in the same court, it being held that if the ship sails on her first voyage in an unseaworthy condition the underwriter is not liable for repairs rendered necessary,

of a mutual company that every ship insured by them shall be surveyed once a year by the managing underwriters, and such

not by perils of the sea, but by the bad condition of the ship at the commencement of the risk. Fawcus *v.* Sarsfield, 6 Ellis & B. 192, 34 Eng. L. & Eq. 277.

In this country there have been as yet but few cases on this subject. In Paddock *v.* Franklin Ins. Co., 11 Pick. 227, 231, 232, *Shaw*, C. J., said, that if a policy was effected to commence on a ship on a particular day, in the latter part of a long whaling voyage in distant seas, the rule of sea-worthiness would be applied, but with great liberality of construction. In Martin *v.* Fishing Ins. Co., 20 Pick. 389, it seems to have been taken for granted that there was an implied warranty when the risk commenced. In the case of American Ins. Co. *v.* Ogden, 20 Wend. 287, there was a time policy for six months. The vessel sailed from New York to Charleston, thence to Norfolk, thence to St. Thomas. When she left Charleston she was in an unseaworthy condition owing to the loss of the small bower anchor. This might have been replaced at C. On the voyage from Norfolk to St. Thomas she was injured by a storm, and was abandoned at the latter port. The want of the anchor contributed in no degree to the loss. It was contended that there was an implied warranty that the vessel should be sea-worthy on leaving every port which she visited, but the court held, that the same rule applied as in the case of voyage policies, and that it was sufficient if the vessel was sea-worthy when she left New York. In Jones *v.* Ins. Co., 2 Wallace, C. C. 278, Mr. Justice *Grier* held, that the plea should "state such facts and circumstances as shall show either that at the time the insurance commenced, the ship was in her original port of departure, and commenced her voyage in an unseaworthy condition, and so continued till the time of the loss, or that having come into a distant port in a damaged condition, before or after the commencement of the risk, where she might and ought to have been repaired, and the owner, or his agents, neglected to make such repairs, and the vessel was lost by a cause which may be attributed to the insufficiency of the ship." This case is similar to that of Michael *v.* Tredwin, *supra*. The question has also been before the Supreme Court of Massachusetts, in a recent case, Capen *v.* Washington Ins. Co., 16 Law Reporter, 465. The policy was subscribed April 30th. The risk commenced March 30th, at noon, to continue one year on the ship Rique to and at all ports and places to which she might proceed in that time. There was evidence tending to show that the vessel was at sea at the time the policy was subscribed, but there was no evidence that at the time the risk commenced she was not either safe in port, or in the prosecution of a voyage on which she had sailed in a sea-worthy condition. The vessel arrived in Boston in September, delivered her cargo in good order, and, after undergoing some slight repairs, sailed for Norfolk. She there took in a heavy cargo, which had a tendency to strain the vessel, and sailed for Sicily. But, having sprung a leak, she put into Savannah, where she was surveyed and extensive repairs ordered; but as repairs were less expensive in New York, she was slightly but sufficiently repaired at S. and sailed for New York. On the way she was burned at sea. The defence was: First, that at the commencement of the risk on the 30th of March, regarding decay only, this vessel was so much weakened and impaired in strength as not to be able to bear the ordinary perils of navigation, without essential repairs, and replacing with new the timbers thus decayed or beginning to decay, *for and during the term of one year*, for which she was insured, and if so that she was not sea-worthy within the implied warranty, which the assured were bound by, and so the policy never attached. Second, that this implied warranty attached to the commencement of each

repairs and materials ordered as are necessary, which orders must be complied with, or the ship "shall not be insured," is in effect an agreement that the ship shall be considered unseaworthy, and the insurance at an end if these requirements are not complied with.[1]

The warranty of seaworthiness, although most important among those implied by law, is not the only one. Another is, that the assured is to make a distinct and honest statement of all material circumstances attending the risk. Another, that the ship shall pursue the course of her voyage in the usual manner,

voyage, so that if the vessel sailed in an unseaworthy condition, and was lost by a peril insured against, and not in consequence of such unseaworthiness, the underwriters were not liable. Third, that the vessel was unseaworthy when she sailed from Norfolk to Sicily, and also when she sailed from Savannah to New York. The court held, that on a policy on time for a certain term at all times and places, there is no implied warranty on the part of the insured, that the vessel is sea-worthy, in the ordinary sense of that term, either at the time the policy is underwritten, or at the day on which the policy, by its terms, commences the risk, but that the only implied warranty in this respect is, that the vessel is in existence as a vessel, not lost at the time fixed for the commencement of the risk; capable, if then in port, of being made useful, with proper repairs and fittings, for navigation, and in a safe or suitable condition for a vessel to be in, whether at sea, or in port, or stripped and under repairs on a suitable railway for that purpose, or otherwise, and is sea-worthy when she first sails from port, and if she is at sea, that she has sailed in a sea-worthy condition, and is safe (*salvus* — not lost) so as to be a proper subject for a contract of insurance at the time the risk attaches; and if the vessel is in such a condition, and the implied warranty to this extent is not broken, the policy attaches, and is not void, and the premium cannot be recovered back. But if the vessel was then lost, become a wreck, or had ceased to exist as a vessel, or was, if at sea, in a condition or under circumstances in which she could not, on her arrival in port, be made available by reasonable or suitable repairs and fitting for navigation, then there was no subject for the policy to take effect upon, and the contract would be void. Held, also, that there was no implied warranty at subsequent ports, but that the owners were obliged to render her sea-worthy if possible, and if she sailed in an unseaworthy condition, and was lost in consequence of such default, the insured would not be entitled to recover, but if she was lost by a peril insured against, not caused in whole or in part by such default, the underwriters would be liable.

[1] Stewart *v.* Wilson, 12 M. & W. 11. The policy in this case was dated February 20, 1841, and was for one year. The vessel was surveyed in September, 1841, and the repairs ordered. These were not furnished, and the vessel went to sea in November, and was lost. There was another clause in the policy providing, that should any vessel proceed on an American voyage, the insurance should cease; and it was argued that from the different language used in the two clauses the effect of the rule as to the survey was only to prevent a renewal of the insurance in case of disobedience, and did not render void an existing policy. But the court held the effect of the rule was, that the vessel was to be considered unseaworthy, and the insurance void, unless the directions of the managing underwriters were from time to time complied with.

without deviation or change of risk. And, perhaps another, that the risk is to commence and the policy is to attach within a reasonable time; so that, after an unreasonable delay, the policy will not attach at all, because the delay will have the effect of a deviation, at the beginning.

These subjects will be considered separately.

CHAPTER IV.

OF REPRESENTATION AND OF CONCEALMENT.

SECTION I.

OF REPRESENTATION.

BESIDES the warranties and stipulations which may be expressed by the parties, or implied by the law, analogous rights and liabilities sometimes spring from the representations made by either party to the other, in reference to a contract of insurance then under negotiation, and material to the estimate of the risk to be assured.[1] That misrepresentations avoid the contract of insurance as between the parties to the contract, is agreed and certain; but there is some difference of opinion as to the grounds of this rule.[2] And the better opinion seems to be, that

[1] "The policy would equally be void, against the underwriter, if he concealed (material facts); as if he insured a ship on her voyage which he privately knew to be arrived: and an action would lie to recover the premium." Per Lord *Mansfield*, C. J., Carter *v.* Boehm, 3 Burr. 1905, 1909. See also, Duffell *v.* Wilson, 1 Camp. 401.

[2] Mr. Arnould, in his work on Insurance, p. 495, contends that it is on the ground of constructive or legal fraud. This he defines to be "such conduct on the part of the assured as, though it does not imply any moral turpitude in himself, yet, from the effect it has in fact of misleading the underwriter, is in legal language said to be fraudulent." See also, Pawson *v.* Watson, Cowp. 785; Cornfoot *v.* Fowke, 6 M. & W. 358, 379; Elkin *v.* Janson, 13 M. & W. 655, 658. This is controverted by Mr. Duer and Mr. Phillips, on the ground that this is an anomalous use of the term, and that the true reason is that there is an implied condition in the contract of insurance that it is free from misrepresentation or concealment, whether fraudulent or through mistake. 2 Duer on Ins. 647; 1 Phillips, Ins. § 537. This question becomes of importance in determining whether, if an insurer alleges that a misrepresentation is falsely and fraudulently made, he is bound to sustain his allegation by proof of moral

where there is a misrepresentation, the insurance is for all purposes null and void, and not voidable only.[1] In general, to constitute a representation in this sense, and for this purpose, "there should be an affirmation or denial of some fact, or an allegation which would plainly lead the mind to the same conclusion."[2]

It may be made by word of mouth, or in writing, or by the

fraud, or whether it is not sustained by the proof of falsehood, whether intentional or not, which is considered as legal or constructive fraud. The point arose in the late case of Lewis *v.* Eagle Ins. Co., Sup. Jud. Ct., Mass., March Term, 1858. The defendants alleged that a certain material representation was "falsely and fraudulently made." At the trial, the court instructed the jury that it was necessary to prove not only that it was false, but also that it was fraudulent. The jury having found a verdict for the plaintiff, exceptions were taken to the above ruling, on two grounds: 1st. That the word "fraudulent" meant legal fraud, and that a false representation of a material fact constituted a legal fraud, in support of which, the English authorities above referred to, and the case of Burritt *v.* Saratoga Co. Mut. F. Ins. Co., 5 Hill, 188, 191, were cited. 2d. That as a *false* representation would avoid a policy, the word *fraudulent* might be struck out as surplusage. Commonwealth *v.* Squire, 1 Met. 258, 260, Commonwealth *v.* Baker, 10 Cush. 405, Southall *v.* Rigg, 11 C. B. 481, 4 Eng. L. & Eq. 366, and Anderson *v.* Thornton, 8 Exch. 425, 20 Eng. L. & Eq. 339, were cited. The court held that it was not necessary to prove fraud, but it does not very clearly appear from the decision, upon which of the two grounds above mentioned the case rested. Speaking of the allegation of fraud, the court, per *Merrick*, J., said: "There is nothing in their answer which imposes upon the defendants the burden of proving this fact, in addition to the fact of a false representation, in order to maintain their defence. It is true that they allege, in general terms, that the representation of which they complain, was falsely and fraudulently made. But whether this representation was designedly and intentionally erroneous, and made with the corrupt purpose of gaining an undue advantage or not, is immaterial in relation to the question at issue between the parties; for, if it was false, it clearly exonerated the defendants from a performance of the contract on their part, and wholly avoided the policy."

In Anderson *v.* Thornton, *supra*, which was an action on a policy of insurance, it does not clearly appear from the pleas, as they are stated in the report of the case, that fraud was alleged, but the language of the court shows that this must have been the case. *Parke*, B., said: "Much reliance was placed on the form of the sixth and seventh pleas; and it was contended, that, inasmuch as those pleas alleged a fraudulent misrepresentation on the part of the plaintiffs, in order to sustain the pleas, it was necessary to prove the fact as fully as alleged; and it was very strongly urged that the plaintiffs had been subjected to a great hardship in being compelled to combat such pleas by having to procure evidence to disprove the matters of fraud, it turning out afterwards on the trial that there was no such imputation of fraud on the plaintiffs. But the pleas were supported by proof of material communications by the agents; for in cases of insurance, material misstatement or concealment vitiates the contract, and whether it be fraudulently made or not, is a matter which is wholly immaterial, except with reference to the return of the premium."

[1] See cases cited ante, p. 101, n. 1.

[2] Livingston *v.* Maryland Ins. Co., 7 Cranch, 506.

exhibition of a letter, or a newspaper, or other written or printed paper, or by a reasonable inference from the words of the policy.[1] It is a misrepresentation under the law of insurance, when it is false, whether intentionally so or not, and tends to obtain for the party uttering it some advantage in the bargain, or an entering into the bargain by the other party. And it has the same effect whether made in reference to a matter concerning which some representation is necessary or otherwise.[2] Thus, if the first insurer is merely a decoy, this is equivalent to a misrepresentation, in regard to the other insurers, and discharges them.[3] For it must be remembered, that the question as to the materiality of a representation, is not whether the fact stated actually did or possibly could affect the risk, but whether it would naturally tend to influence the insurer in his estimate of the risk.[4]

[1] The general rule of law is that every direct statement contained in a policy, is to be regarded as a warranty. See ante, p. 106. But it would of course be otherwise if it were agreed in express terms that a direct statement in the policy should be treated as a representation. 2 Duer on Ins. 644. So statements of belief or expectation, though inserted in the policy, are to be regarded as representations only. In Stewart *v.* Morison, Millar on Ins. 59, the words, "the vessel was expected to be loaded between the 13th and 20th of September," were inserted in the policy. This was held to be a representation, that the vessel had not, within the knowledge of the assured, been loaded before the 13th of September. Inferences drawn from statements upon the face of a policy are frequently treated as representations. In Hodgson *v.* Richardson, 1 W. Bl. 463, 3 Burr. 1477, the insurance was from Genoa to Dublin, "the adventure to begin from the loading to equip for the voyage." This clause was held equivalent to a representation that the cargo was to be loaded at Genoa, and as it was in fact loaded at Leghorn, and the risk was thereby materially affected, the policy was held to be void. See Reid *v.* Harvey, 4 Dow, 97; Seton *v.* Low, 1 Johns. Cas. 1, per *Kent*, J.; Vandenheuvel *v.* United Ins. Co., 2 Johns. Cas. 451; Palmer *v.* Warren Ins. Co., 1 Story, 360.

[2] Sawyer *v.* Coasters' Mut. Ins. Co., 6 Gray, 221; Lewis *v.* Eagle Ins. Co., Sup. Jud. Ct., Mass., March Term, 1858, cited on the preceding page. In this case the plaintiff represented, at the time of obtaining the insurance, that the vessel had cost him five thousand dollars, and one thousand more for coppering. The court held that this was a material representation, and, if false, it would avoid the policy.

[3] Whittingham *v.* Thornburgh, 2 Vern. 206; Wilson *v.* Ducket, 3 Burr, 1361.

[4] In Sibbald *v.* Hill, 2 Dow, P. C. 263, a merchant, to induce an underwriter at Leith to insure for him, stated that he had paid no more than eight guineas per cent. for the same risks in London. He had actually paid as high as twenty-five per cent. The contract was held valid in Scotland on the ground that, "the statement as to the premium was not a misrepresentation as to any of the circumstances attending the situation or condition of the ship, or nature of the voyage, which could affect the nature of the risk." The House of Lords reversed the judgment on the ground "that every misrepresentation is fatal to a contract, which is made under such circumstances

SECTION II.

OF CONCEALMENT.

Concealment, in the law of insurance, is the suppression of a fact unknown to the other party, which refers to the pending bargain, and is material to its terms;[1] and it is no defence against a concealment, that it is proved by the result to relate to circumstances which did not in fact enter into the risk.[2] The law is so nearly the same in respect to misrepresentation and concealment, that we cannot avoid speaking of them together.

A misrepresentation or a concealment discharges the underwriters, although it is not intentional and fraudulent in fact, but is made from inadvertence, or forgetfulness, or misapprehension; by reason of the implied obligation of a full and honest statement.[3] And we consider it the better rule that the falsehood of a representation discharges the insurers, although they were not influenced by it; but there may be room for a distinction here, which would discharge the insurers only when the misrepresentation was *knowingly* and *wilfully* made.[4] A temporary

and in such a way, as to gain the confidence of the other party, and induce him to act when otherwise he would not."

[1] Maryland Ins. Co. *v.* Ruden, 6 Cranch, 338; Hurtin *v.* Phœnix Ins. Co., 1 Wash. C. C. 400.

[2] See post, p. 165, n. 2.

[3] In Burritt *v.* Saratoga M. F. Ins. Co., 5 Hill, 188, *Bronson*, J., said: "In marine insurance the misrepresentation or concealment by the assured of a fact material to the risk, will avoid the policy, although no fraud was intended." See also, Curry *v.* Commonwealth Ins. Co., 10 Pick. 535; Sawyer *v.* Coasters' Mut. Ins. Co., 6 Gray, 221; N. Y. Bowery Ins. Co. *v.* N. Y. Fire Ins. Co., 17 Wend. 359; Dennison *v.* Thomaston Mut. Ins. Co., 20 Maine, 125; Bridges *v.* Hunter, 1 M. & S. 15; Fitzherbert *v.* Mather, 1 T. R. 12; and ante, p. 155, n. 2.

[4] In Flinn *v.* Headlam, 9 B. & C. 693, it was held that a misrepresentation as to a fact affecting the risk, might be shown not to have influenced the underwriter, and consequently not to have been material. In Clason *v.* Smith, 3 Wash. C. C. 156, the alleged misrepresentation was contained in a letter from the assured to their agent, in which they offered to give fifteen per cent. premium, and added, "we have no doubt, but that we could get the insurance effected in New York at that premium." This statement, which was false, was shown to the underwriters, but they declined taking the risk at less than twenty per cent., which rate was finally accepted. It was held that the

non-compliance after the risk has commenced, does not discharge the underwriters, if the representation be of a continuous character, and be complied with before any loss connected with it occurs.[1] And if the misrepresentation or concealment refers to a severable subject-matter of insurance, or to a severable risk, the insurance is avoided as to that part, or that risk, but is valid as to the rest; unless the circumstances and nature of the contract are such that this partial misrepresentation enhances the risk as to the whole.[2] Nor are the insurers discharged by non-compliance with a misrepresentation which ceases to be material before the risk begins; or if it be withdrawn before the policy is made, expressly, or by the implication arising from a subsequent and opposite representation.[3]

misrepresentation was immaterial, as it in no way influenced the underwriters. *Washington*, J., said: "A misrepresentation to avoid a policy must not only be false, but it must be material either in relation to the rate of premium, or as offering a false inducement to the underwriter to take the risk at all, when otherwise perhaps he would not have done it. If, in point of fact, it had no influence, nor ought to have had any in these respects, it is impossible to say that it was material." See also, Snyder *v.* Farmers' Ins. & Loan Co., 13 Wend. 92; 16 Wend. 481, 490; Rice *v.* New England Mar. Ins. Co., 4 Pick. 439, 443; Ruggles *v.* General Interest Ins. Co., 4 Mason, 74; Coulon *v.* Bowne, 1 Caines, 288.

[1] This question is considered in 2 Duer on Ins. 697, but does not appear to have come up for adjudication. But the principles which have been adopted in the American courts in relation to the warranty respecting the continuance of sea-worthiness, seem to leave little doubt that the doctrine of the text would be adopted. See ante, p. 142, n. 1.

[2] 1 Phillips on Ins. § 680. In Marshall *v.* Union Ins. Co., 2 Wash. C. C. 357, there was a suspicion resting upon a part of the cargo, which might subject that portion to seizure. It was held that a concealment as to that, would avoid policies on the whole, because it would subject the whole to capture and detention. See cases ante, p. 105, n. 2.

[3] Dawson *v.* Atty, 7 East, 367. In Edwards *v.* Footner, 1 Camp. 530, a week before the policy was signed, it was represented that the vessel would sail with convoy, and carry ten guns and twenty-five men. There was no further conversation in regard to the representations either at the time the policy was made, or in the intervening period, and the vessel sailed without convoy, and carried only eight guns and seventeen men. It was contended that the court could look only at what took place at the time the policy was subscribed. Lord *Ellenborough*, C. J., said: "If a representation is once made, it is to be considered as binding, unless there is evidence of its being afterwards altered or withdrawn. But here there is no evidence of any conversation upon this subject between the parties subsequently to the statement that the ship was to carry ten guns and twenty-five men; and this having taken place when the insurance was talked of, and the terms of it were agreed upon, it must be referred to the policy, and

If the representation is true at the time it is made, subsequent events not caused by the misconduct of the assured, will not, generally, discharge the underwriters.[1]

If the assured make a misrepresentation, or a concealment, in entire ignorance, if the ignorance be wilful on his part, and intended to save him from the obligation of disclosure, this ignorance is no excuse, and he is affected in the same way as he would be by a wilful misrepresentation or concealment.[2] A statement that such a thing is believed to be so, or not to be so, is complied with if the belief exists, although the fact is entirely

treated as a representation which required to be substantially complied with on the part of the assured."

In Bize *v.* Fletcher, 1 Doug. 284, the policy described the voyage as "to all or any ports and places where and whatever in the East Indies, etc., or elsewhere beyond the Cape of Good Hope." The representation confined the voyage to a few places. It was held that the insured might make any voyage covered by the description in the policy. See Vandervoort *v.* Smith, 2 Caines, 155; Atherton *v.* Brown, 14 Mass. 152.

[1] Driscol *v.* Passmore, 1 B. & P. 200.

[2] Biays *v.* Union Ins. Co., 1 Wash. C. C. 506. The same rule applies if the ignorance be owing to the negligence of the assured. But he is only bound to use ordinary diligence to obtain information. M'Lanahan *v.* Universal Ins. Co., 1 Pet. 170, 185; Neptune Ins. Co. *v.* Robinson, 11 Gill & J. 256.

The same is true if a party having given orders for insurance, receives information affecting the risk, and does not use reasonable diligence to communicate it. Watson *v.* Delafield, 2 Caines, 224, 1 Johns. 150, 2 Johns. 526; Batchelder *v.* Jones, Sup. Jud. Ct., Mass., 2 Dane Abr. 123; Grieve *v.* Young, Millar, Ins. 65; Green *v.* Merchants' Ins. Co., 10 Pick. 402; M'Lanahan *v.* Universal Ins. Co., *supra*; Byrnes *v.* Alexander, 1 Brev. 213.

So if the agent of the party applying for insurance is ignorant through negligence, either his own or that of insured, the underwriter is discharged. In Wake *v.* Atty, 4 Taunt. 494, a broker effected a policy at Lloyd's at a time when a letter lay on his table at the coal exchange unopened, announcing the ship's loss. Held, that the jury were warranted in finding this was no such want of diligence as avoided the policy. In M'Lanahan *v.* Universal Ins. Co., *supra*, Mr. Justice *Story* said: "The case of Wake *v.* Atty, lays down no new rule; but merely applies the old one, to circumstances somewhat nice and peculiar in their presentation." In Fitzherbert *v.* Mather, 1 T. R. 12, the letter was written by an agent applying for insurance, but before it went by the post, he received intelligence that the vessel was lost, and did not communicate it. Lord *Mansfield*, C. J., said: "This policy was effected by misrepresentation, and that misrepresentation arose from the proper agent of the plaintiff, who gave the intelligence. Now whether this happened by fraud or negligence, it makes no difference; for in either case the policy is void." See Andrews *v.* Marine Ins. Co., 9 Johns. 32; Green *v.* Merchants' Ins. Co., 10 Pick. 402.

otherwise.[1] But if a person knowing nothing about the fact states a certain thing to be true, it is said to affect him as if he knew it to be false, if it be so in fact.[2]

The representation may relate to the future; and if it be thus promissory in its nature, a compliance with it in the future, is just as necessary (according to what we consider the weight of reason and of authority), as a present compliance with a present representation.[3]

[1] As where a vessel is represented as expected to sail at or within a certain time, and it does not sail till afterwards. Bowden *v.* Vaughan, 10 East, 415; Whitney *v.* Haven, 13 Mass. 172; Stewart *v.* Morison, Millar, Ins. 59; Bize *v.* Fletcher, 1 Doug. 284; Barber *v.* Fletcher, 1 Doug. 305; Rice *v.* New England Mar. Ins. Co., 4 Pick. 439; Allegre *v.* Maryland Ins. Co., 2 Gill & J. 136. In Bryant *v.* Ocean Ins. Co., 22 Pick. 200, the assured represented that the vessel was taking in paving stones for ballast, and should fill up with hay. Instead of complying with this representation, the vessel took an entire cargo of paving stones, and no hay. This was a more perilous cargo, and the risk was thereby increased. There was no evidence that at the time the representation was made, the insured were not taking in stones as represented, or that they did not then expect or intend to take in a cargo of hay, and no fraudulent intent was shown. Held, that this being merely a statement of the intention of the assured, made without fraud, the policy was not rendered invalid by a non-compliance with it. In Hubbard *v.* Glover, 3 Camp. 313, the broker refused to warrant that the vessel would sail before the first of August from Petersburgh or Cronstadt, saying: "There is no occasion for that; the ship has sailed some time, and must now be at Gottenburgh. There is a cargo ready for her; and she is sure to be an early ship." The ship was delayed at Cronstadt, waiting for a cargo, and did not sail from there till the 30th of September, and was lost on the homeward passage. Held that the underwriters were liable, as the statement that a cargo was ready, could from its very nature be only a subject of expectation and belief. See also, Christie *v.* Secretan, 8 T. R. 192. So if the broker states by way of inference or computation that the ship was at a given place when the policy was made, the underwriters are held though the broker was mistaken, it being their duty to inquire what the facts were on which he founded his opinion. Brine *v.* Featherstone, 4 Taunt. 869. See also, Clason *v.* Smith, 3 Wash. C. C. 156; Maryland Ins. Co. *v.* Bathurst, 5 Gill & J. 159; Astor *v.* Union Ins. Co., 7 Cow. 202; Callaghan *v.* Atlantic Ins. Co., 1 Edw. Ch. 64.

[2] Macdowall *v.* Fraser, 1 Doug. 260; Pawson *v.* Watson, 2 Cowp. 785, 788.

[3] In Flinn *v.* Headlam, 9 B. & C. 693, Lord *Tenterden* seems to have supposed that a promissory representation would not be binding, and that non-compliance with it would only defeat the policy on the ground of actual fraud. See also, Flinn *v.* Tobin, Moody & M. 367. But it was settled in Dennistoun *v.* Lillie, 3 Bligh, 202, that such a representation is binding. The representation in that case was, that the ship "will sail on the first of May." See also, Edwards *v.* Footner, 1 Camp. 530; Steel *v.* Lacy, 3 Taunt. 285. The question has arisen in the American courts on fire policies, and there are several decisions in which such a representation has been held binding. Clark *v.* Manuf. Ins. Co., 8 How. 235; Houghton *v.* Manuf. Mut. Fire Ins. Co., 8 Met. 114; Underhill *v.* Agawam Mut. Fire Ins. Co., 6 Cush. 440; Alston *v.* Mechanics' Mut. Ins.

One who is already insured by one party, and then applies to a second party for further insurance, of the same subject in the same or in a connected policy, is to be supposed to propose to the second a similar insurance to the first, unless the terms of the negotiation or bargain present a difference. If, therefore, a mis-

Co., 1 Hill, 510. But when this last case came up in error, 4 Hill, 329, *Walworth*, Ch., gave a very elaborate opinion, in favor of holding all statements respecting future events, as mere representations of intention, not to defeat the policy, unless made fraudulently. The same doctrine appears to be supported in Rice *v.* New England M. Ins. Co., 4 Pick. 439; Bryant *v.* Ocean Ins. Co., 22 Pick. 200; Allegre *v.* Maryland Ins. Co., 2 Gill & J. 136. But the doctrine that promissory representations are binding, is supported by all the late text writers. 2 Duer on Ins. 657, note VI.; 1 Arnould on Ins. 503; 1 Phillips, Ins. § 553. The very elaborate note of Mr. Duer, and the opinion of Chancellor *Walworth*, referred to above, seem completely to exhaust the arguments on both sides of this question.

If it is entirely settled that there are promissory representations just as binding as those respecting existing facts, there is still a great difficulty in each case in determining whether a statement respecting a future event, is to be regarded merely as a representation as to an expectation or intention, or as an absolute agreement. See ante, p. 159, n. 1; Benham *v.* United Guarantie & Life Ass. Co., 7 Exch. 744, 14 Eng. L. & Eq. 524; Dennistoun *v.* Lillie, *supra*. In Bowden *v.* Vaughan, 10 East, 415, it was held that in an insurance on the cargo, a statement as to the time the ship was about to sail, must be regarded merely as a representation as to expectation or belief, because the owner of the goods had no control over the time of the ship's sailing. There seems also to be some question as to whether a statement of a thing being in a present condition is to be construed as a representation that it shall so continue during the risk. In Frisbie *v.* Fayette Mut. Ins. Co., 27 Penn. State, 325, the words "clerk sleeps in the store," were held to be words of mere description of the state of things at the time the policy was made, and not to amount to a warranty for the future. See also, Billings *v.* Tolland Co. Mut. F. Ins. Co., 20 Conn. 139; Shaw *v.* Robberds, 6 A. & E. 75; Pim *v.* Reid, 6 Man. & G. 1; Stokes *v.* Cox, 1 H. & N. 533, 38 Eng. L. & Eq. 437, reversing same case, 1 H. & N. 320, 37 Eng. L. & Eq. 561. In Houghton *v.* Manuf. Mut. F. Ins. Co., 8 Met. 114, 121, there were certain representations in regard to the condition of the building, etc., and also the following clause: "If the situation or circumstances, affecting the risk upon the property insured shall be altered or changed, by or with the advice or consent of the assured or their agent, so as to increase the risk thereupon, without the consent of the company, the policy shall be void." The court held that the legal effect of this clause, taken in connection with the representations, was, that so far as the latter set forth certain usages and practices observed in the building insured, as to the mode of conducting the business, and as to the precautions taken to guard against fire, it was not only an affirmation that the facts were true at the time, but also a stipulation that as far as the assured, and all those intrusted by them with the care and management of the property were concerned, such modes of conducting the business should be observed, and such precautions substantially continue to be taken, during the continuance of the policy. See also, Loud *v.* Citizens' Mut. Ins. Co., 2 Gray, 221; Crocker *v.* People's Mut. F. Ins. Co., 8 Cush. 79; Jones Manuf. Co. *v.* Manuf. Mut. F. Ins. Co., 8 Cush. 82; Williams *v.* New England Mut. F. Ins. Co., 31 Maine, 219.

representation or concealment exist as to the first underwriter, a later one may avail himself of it.[1] But if the contracts are distinct and unconnected, as they are, if the policies are different and independent, then a second insurer cannot avail himself of a misrepresentation made to the first.[2]

If a representation is made to any insurer excepting the first, it seems that this is not to be considered as made to the subsequent insurers.[3]

The general rule as to the effect of representations made to the first insurer, applies only to those which are favorable to the insurer and would tend to lower his estimate of the risk; and not to those, which, if communicated, would increase his liability.[4]

[1] Feise *v.* Parkinson, 4 Taunt. 640. In Pawson *v.* Watson, 2 Cowp. 785, the first underwriter had the following statement showed to him: "She mounts twelve guns and twenty men." This representation was not communicated to the defendant. Lord *Mansfield* held that he could not make it a part of his agreement. The reason of the general rule is thus stated on page 786: "A misrepresentation made to the first underwriter ought to be considered as a misrepresentation made to every one of them, and so would infect the whole policy. Otherwise it would be a contrivance to deceive many, for where a good man stands first, the rest underwrite without asking a question; and if he is imposed upon, the rest of the underwriters are taken in by the same fraud." And the reason of the exception on page 789, "Matters of intelligence, such as that a ship is or is not missing, are things in which a man is guided by the name of a first underwriter, who is a good man, and which another will therefore give faith and credit to; but not to a collateral agreement which he can know nothing of. The absurdity is too glaring; it cannot be." The misrepresentation must be material. A statement, therefore, made to the first, that the vessel was *expected* to sail at a certain time, does not come within the general rule. Barber *v.* Fletcher, 1 Doug. 305; Stackpole *v.* Simon, Park on Ins. 582. In Forrester *v.* Pigou, 1 M. & S. 9, 13, Lord *Ellenborough* said: "Whenever the question comes distinctly before the court, whether a communication to the first underwriter is virtually a notice to all, I shall not scruple to remark that that proposition is to be received with great qualification. It may depend upon the time and circumstances under which that communication was made; but on the mere naked, unaccompanied fact of one name standing first upon the policy, I should not hold that a communication made to him, was virtually made to all the subsequent underwriters."

[2] Elting *v.* Scott, 2 Johns. 157. See also, Williams *v.* New England Mut. F. Ins. Co., 31 Maine, 219; Nicoll *v.* Am. Ins. Co., 3 Woodb. & M. 529.

[3] Bell *v.* Carstairs, 2 Camp. 543; Brine *v.* Featherstone, 4 Taunt. 869, 871, per *Mansfield*, C. J. It has accordingly been held, in England, that if the underwriter who first signs the slip for insurance does not sign the policy first, a representation made to him is not made to the others if the slip is not admissible in evidence for want of a stamp. Marsden *v.* Reid, 3 East, 572.

[4] Robertson *v.* Majoribanks, 2 Stark. 573.

The misrepresentation has the same effect, whether made at the time of effecting the insurance, or at any time before, if made in connection with the insurance.[1] But to ascertain whether there be a misrepresentation, the state of facts only at the time the insurance is effected must be considered; for if the misrepresentation were made earlier, it may have ceased to be material at the time the policy was made, or it may have been revoked or superseded, or, although false when made, it may have become true when the insurance is actually effected.[2]

Although, as we have seen, a misrepresentation may be fatal to the insurance, although made from mere inadvertence, yet the intention is sometimes very important. Thus, if the misstatement or concealment be immaterial, yet if it be intended and wilful, it will avoid the insurance. For if the insurers are led to make the contract by misrepresentations, fraudulently made, with intent to influence them against their own interest, they are discharged, although these representations or concealments might not have had a natural tendency to obtain from them a bargain any worse for themselves. So, although the misrepresentations are actually immaterial, yet if in reply to a distinct inquiry, this proves that they were deemed material by the insurer, and is conclusive evidence that they were so in fact.[3]

The question presents some difficulty, whether an insured owner is affected by the concealment of a fact, of which he was wholly ignorant by reason of his master's fraudulently withholding it from him. The knowledge of the master as his agent, may not be fairly imputable to him as his knowledge; but there are strong reasons for holding that such a contract is void because entered into under an essential misunderstanding of both the parties; but an American decision, for reasons which do not seem to us sufficient, appears to be otherwise.[4]

[1] See ante, p. 157, n. 3.

[2] See ante, p. 157, n. 3.

[3] A false statement, made knowingly by the insured, in answer to inquiries of the insurer, is conclusively presumed to be material. Burritt *v.* Saratoga Co. Mut. Fire Ins. Co., 5 Hill, 188; Dennison *v.* Thomaston Mut. Ins. Co., 20 Maine, 125.

[4] In Gladstone *v.* King, 1 M. & S. 35, the vessel was seriously injured, and afterwards

In some instances the rate of premium may help to determine the question of misrepresentation. If, for instance, the case is one of extraordinary risk, the nature of which must have been known to the insured, and only an ordinary premium is paid, this fact may be used with others to lead to the inference that the contract was made under an ignorance on the part of the insurer for which the insured is responsible.[1]

As insurance, like most other contracts, may be made through an agent, it is of importance to ascertain what effect the misrepresentation or concealment of an agent has upon the policy. If this were with the knowledge and by the instruction of the principal, it need not be said that it must have precisely the same effect as if made by the principal himself. The law, however, seems to go further than this; for the misrepresentation or concealment of an agent, without the authority, assent, or even knowledge of his principal, will, nevertheless, discharge the underwriters. Some one must suffer for this wrong doing; and it should be the party who employs the wrongdoer, rather than

the master wrote a letter to the insured, without alluding to the injury, and the insurance was effected after that letter had been received. It was held, that the insured could not recover for the injury. The same principle seems to have been adopted in Fitzherbert *v.* Mather, 1 T. R. 12.

But a similar question arose in Ruggles *v.* Gen. Int. Ins. Co., 4 Mason, 74. The insurance was effected Feb. 9th, on the sloop Harriet "lost or not lost," beginning on the 12th of January preceding. On the 19th of January the vessel was totally lost, and the master had neglected to give notice of the loss to the owner, for the avowed purpose of allowing him time to effect an insurance. It was held, that the insurers were liable. *Story*, J., sustained the English cases cited above, on the ground that in both there was an actual misrepresentation by the party procuring the insurance. The case was carried to the Supreme Court and is reported, 12 Wheat. 408. The opinion of the court, by *Thompson*, J., sustains the decision below, on the ground that the concealment must be by an agent employed to procure insurance, in order to defeat a policy, and that, after a total loss, the master was the agent of the underwriter rather than of the insured. But this decision is questioned by Mr. Duer (2 Duer on Ins. 415, et seq., and note XI. to chap. XIV.), and by Mr. Phillips (1 Phillips, Ins. § 549).

[1] Westbury *v.* Aberdein, 2 M. & W. 267; Bridges *v.* Hunter, 1 M. & S. 15, 18; Clason *v.* Smith, 3 Wash. C. C. 156; Burr *v.* Foster, 2 Dane, Abr. 122. In Nicoll *v.* American Ins. Co., 3 Woodb. & M. 529, 535, *Woodbury*, J., said: "Perhaps the best test as to the materiality of the variance is, that it increases the risk so as to require a larger premium. The rule that it must be material, and the test of its being material, that it increases the risk is such that when the shade of difference in the risk is so slight as not to require an increased premium, perhaps it will be safe to say this is proof that the difference is not material."

the equally innocent party who had nothing to do with his appointment.[1]

Still, if the insured communicate to the insurers, in good faith, information acquired only from newspapers or other sources having no particular connection with the insured, and the information proves erroneous, the policy is, nevertheless, valid, even if made on the credit of that information. Because here is no misrepresentation; the insured does not state facts as being so, but only that he is so informed, which is true; and the insurers can estimate the value or credibility of the information for themselves; and the insured is not responsible for the truth or good sense of persons equally independent of him, as of the insurers.[2]

An agent to obtain insurance, who has made a proposal for that purpose, and afterwards receives material information enhancing the risk, is as much bound to disclose it or withdraw his offer as the owner himself would be; and if he fails to do so, the policy is not binding.[3]

Some question exists how far facts known to any officer of a company, are to be considered as known or disclosed to all. It is obvious, however, that this must depend on the kind and degree of authority or agency with which the agent is clothed, either by his office, by usage, or by the direct act of the company. It has been held, that facts known to a director, were not, therefore, known to the company; but we should

[1] Sawyer *v.* Coasters' Mutual Ins. Co., 6 Gray, 221; Stewart *v.* Dunlop, 4 Brown, 483, note; Fitzherbert *v.* Mather, 1 T. R. 12. In Carpenter *v.* Am. Ins. Co., 1 Story, 57, 63, Mr. Justice *Story* said: "The misrepresentation made by an agent in procuring a policy, is equally fatal, whether made with the knowledge or consent of the principal or not. The ground in each case is the same. The underwriters are deceived. They execute the policy upon the faith of statements, material to the risk, which turn out to be untrue. The mistake is, therefore, fatal to the policy, as it goes to the very essence of the contract."

[2] Tidmarsh *v.* Washington F. & M. Ins. Co., 4 Mason, 439, 443, per *Story*, J. "Where a letter contains a representation of facts not known to the party, but from the information of others, and so the letter states the facts, or it is a necessary inference from the nature of them, there the representation is not falsified by the mere proof, that the facts are not so, if the party communicating the facts did receive such information, and *bonâ fide* confided in it. He undertakes there, not for the truth of the facts, but for the truth of his information."

[3] Fitzherbert *v.* Mather, 1 T. R. 12.

think that the decisions might often, if not generally, be the other way.[1]

SECTION III.

WHAT THINGS SHOULD BE COMMUNICATED.

It may be useful to state the principal things which it has been held necessary, and what unnecessary, to communicate. In the first place, the assured is bound to communicate not only ascertained facts, but all intelligence and even all rumors, not manifestly frivolous; if they are of a character to enter into the estimate of the risk. And a concealment of these things will avoid the policy, although the intelligence or rumors were of a doubtful character at the time, and have since been found to be wholly false.[2] But the assured is bound to disclose only facts,

[1] Himely *v.* South Car. Ins. Co., 3 Const. Rep. 154. It does not appear distinctly in the report of this case whether the facts came to the knowledge of the director at the time when he was a director or before. The company had been recently formed, and it is expressly stated that it did not exist at the time the intelligence was published in the newspapers. We may, therefore, infer that the facts were not known to the director in his official capacity.

[2] In Lynch *v.* Hamilton, 3 Taunt. 37, 44, *Mansfield*, C. J., said: "No doubt, upon established principles, a person insuring is bound to communicate every intelligence he has that may affect the mind of the underwriter in either of these two ways; first, as to the point whether he will insure at all; and, secondly, as to the point at what premium he will insure." Thus, in Walden *v.* La. Ins. Co., 12 La. 134, the insured was induced, by a rumor of an attempt to set fire to an adjacent ropewalk, to have his own house insured, and withheld this circumstance from the underwriters. The ropewalk was so near his house that if one had caught fire the other would probably have been destroyed. Held, that this was a concealment of a fact material to the risk. So a rumor of cruisers being on the coast should be communicated. Durrell *v.* Bederley, Holt, N. P. 283; Beckwaite *v.* Nalgrove, Holt, N. P. 288, n., cited 3 Taunt. 41. In Seaman *v.* Fonereau, 2 Stra. 1183, the insured had received a report that the vessel had been seen in the night leaky, and had disappeared the next day. The concealment of this fact was held to avoid the policy, although the report proved to be false, and the ship was afterwards lost by capture. In Burr *v.* Foster, 2 Dane, Abr. 122, insurance was effected in Boston on horses, from New London to Barbadoes in the brig Aurora of Hartford. Three months after the vessel sailed, a captain of a vessel arrived at New York and reported that he saw the brig Deborah of Hartford a wreck in lat. 24 N. In consequence of this report the underwriters in New York refused to take the risk, and insurance was then obtained in Boston, the underwriters there not knowing of these facts. The captain described the wreck as the Deborah, a half-rigged brigan-

or intelligence, and not a mere opinion, or hope or fear of his own, which does not rest upon some definite fact or ground.[1]

tine, one hundred and fifty tons, no head, cabin not painted. The Aurora was a full rigged brigantine, one hundred and eight tons, figure-head, and cabin painted. No evidence was produced that there ever had been a vessel in Hartford called The Deborah. Held, that the underwriters should have been informed of the report. See De Costa *v.* Scandret, 2 P. Wms. 170; Lynch *v.* Hamilton, 3 Taunt. 37; Lynch *v.* Dunsford, 14 East, 494; Hoyt *v.* Gilman, 8 Mass. 336.

But if a fact be such that it cannot affect the risk, but only the underwriters' estimate of it, as in the case of Sibbald *v.* Hill, ante, p. 155, n. 4, although a false representation with regard to it would defeat the policy, it *seems* that a concealment of it would not. Lexington Ins. Co. *v.* Paver, 16 Ohio, 324. In Haywood *v.* Rodgers, 4 East, 590, the ship had been surveyed at Trinidad on account of her bad character. The survey gave her a good character. As there was a warranty of sea-worthiness, it was held, that whatever formed an ingredient of that need not be disclosed, although it might have enhanced the premium.

In Ruggles *v.* Gen. Int. Ins. Co., 4 Mason, 74, 83, the insured's offers of higher premiums had been refused. *Story*, J., said: "But he was not bound to communicate his other offers, or his fears or hopes, but only to communicate any facts which justified them; and the material fact, as to time, was stated. Underwriters must judge for themselves as to matters of opinion." See Shoolbred *v.* Nutt, Park, Ins. 300; Carter *v.* Boehm, 3 Burr. 1905; Rickards *v.* Murdock, 10 B. & C. 527; Beckwith *v.* Sydebotham, 1 Camp. 116, 2 Duer on Ins. 388, et seq., where this question is considered with great ability.

[1] In Bell *v.* Bell, 2 Camp. 475, the insured had received information, by letter, that all vessels arriving at Riga were ordered to send their letters to St. Petersburgh, and that this order "had produced a great sensation on account of the detention which it would occasion of the vessels; and that the Rising Sun (the vessel insured) must share the same fate." The letter was not shown to the underwriter, but the fact was communicated that the ship's papers had been sent to St. Petersburgh for examination. Lord *Ellenborough* said: "The assured are only bound to communicate facts. The broker was not bound to communicate the sensations and apprehensions which that fact produced at Riga." But in many cases expectations or belief must be communicated, if they would lead to inquiry or to an inference of fact so as to affect the underwriters' estimate of the risk. In Willes *v.* Glover, 4 B. & P. 14, the shippers wrote the consignees, "I think the captain will sail to-morrow; but should he not be arrived in your port, you will be so kind as to make the insurance as low as you possibly can, for my account." The captain did not sail until more than twenty days after the letter was written; but the omission to communicate this letter was held fatal to the policy. See also, Marshall *v.* Union Ins. Co., 2 Wash. C. C. 357; Ely *v.* Hallett, 2 Caines, 57. In Marsh *v.* Muir, 1 Brev. 133, it was held, that the insured is not bound to anticipate a capture and condemnation in violation of the law of nations, and is under no obligation to communicate facts and circumstances from which such capture and condemnation might be apprehended, unless they are such as to create so general impression of danger as must enhance the premium of insurance. But a knowledge of facts and circumstances of the latter description is not to be presumed against the insured; and, although he may be aware that certain circumstances may become grounds of condemnation in violation of the law of nations, there is no implied warranty that they do not exist in relation to the property insured.

If the policy be retrospective, the assured is of course bound to disclose any loss which may have occurred within the period of the risk; and he must also disclose any facts which may have occurred within that period, that would affect the risk, although he does not know how they have affected the vessel. Thus, one insuring his ship for the whole voyage, "lost or not lost," by a policy dated three months after she sailed, is bound to communicate any knowledge or intelligence he has of a storm, occurring in any part of these three months in any place in which the ship may probably have been.[1]

For similar reasons, an insurer who obtains a policy of reinsurance, is bound to state such things as he knows relative to the character of the party originally insured, or the risk originally assumed, as may be material to the risk of reinsurance.[2]

An agent may be bound to disclose what is known to him only because he is an agent; as, if the order to him to effect insurance had been sent by express, or by any way indicating unusual urgency, it is said that he should communicate that fact, unless the dates and distances of the parties implied it; but this is carrying the obligation of disclosure very far.[3]

[1] Moses *v.* Delaware Ins. Co., 1 Wash. C. C. 385; Ely *v.* Hallett, 2 Caines, 57; Fiske *v.* N. E. Mar. Ins. Co., 15 Pick. 310; Gladstone *v.* King, 1 M. & S. 35. In Moses *v.* Delaware Ins. Co. the vessel was on a voyage from Philadelphia to Charleston, and the owner had received private information that there had been a storm "more dreadful than had ever been experienced," at Charleston, near the place where the vessel might be reasonably supposed to be. He procured insurance without communicating the fact. The policy was held to be void, although the underwriters knew that there had been severe gales in that vicinity, and charged a double premium on that account. In Ely *v.* Hallett, the plaintiff was possessed of information that a violent storm had taken place at Norfolk eleven hours after the vessel sailed. This he did not communicate to the defendants, but stated that there had been blowing weather and severe storms on the coast after the vessel had sailed, but made no reference to the particular storm. This was held to be a material concealment, the jury having found that it increased the risk. But in Fiske *v.* New Eng. Mar. Ins. Co. it was held not to be a material concealment that no mention was made of a storm that took place three or four days after the vessel sailed. In Coles *v.* Mar. Ins. Co., 3 Wash. C. C. 158, the insurance was effected on a letter from the captain, who was a part-owner, dated the 13th of August, in which no mention was made of a storm. By the protest it appeared that on the 14th of August the vessel was injured by stormy weather which she had encountered. Mr. Justice *Washington* left it to the jury to decide whether the protest referred to injuries received prior to the 13th, and whether it was material intelligence.

[2] New York Bowery F. Ins. Co. *v.* N. Y. Fire Ins. Co., 17 Wend. 359.

[3] Pothier, Ins. n. 12; Court *v.* Martineau, 3 Doug. 161.

If the voyage or adventure to be insured will violate a recent foreign decree, this is a risk which should be communicated to the insurer;[1] but it would be unnecessary whenever the voyage described, and the general knowledge of the existence of such a law, and of such a trade, justified the presumption that the insurers knew it also.[2] But if the trade is not notoriously illicit, as where it is sometimes prohibited and sometimes allowed, the insurer would not be presumed to know whether it were legal or illegal when he made the insurance.[3]

Many things may or may not be material, according as the circumstances of the case make them the one or the other; and then these same circumstances determine whether they must be disclosed. Among these things are, the national character of the ship or goods;[4] whether she takes letters of marque or not;[5] the interest of the assured in the property;[6] the nature

[1] In Hoyt *v.* Gilman, 8 Mass. 336, the vessel had been ordered to Varel on the Jade. The letter to the agent for procuring insurance, stated that information had been received "of a late decree having been issued by the French emperor, confiscating all vessels and cargoes, entering the Jade, Elbe, or Weser." This was not communicated to the underwriter. Held, that this concealment avoided the policy. See also, Blagge *v.* New York Ins. Co., 1 Caines, 549.

[2] Pollock *v.* Babcock, 6 Mass. 234; Sever *v.* Fletcher, Park, Ins. 360; Calbreath *v.* Gracy, 1 Wash. C. C. 219; Livingston *v.* Maryland Ins. Co., 7 Cranch, 506; Planché *v.* Fletcher, 1 Doug. 251.

[3] Blagge *v.* N. Y. Ins. Co., 1 Caines, 549.

[4] In Campbell *v.* Innes, 4 B. & Ald. 423, the vessel insured in England, sailed on her voyage to Virginia, after the United States had declared war, but before it was known in England. The concealment of the fact that the vessel was American property, was held to avoid the policy. *Bayley*, J., said: "In this case it does not appear that the underwriter knew the ship and goods to be American property. Now that makes a material difference in the risk; for if the property be British owned, of course the owner will do all in his power to prevent the risk from occurring; but if it be American owned, he may, if he be secure of payment by the underwriter, lend himself to the purposes of his own government, and assist them in obtaining possession of the property insured." See Francis *v.* Ocean Ins. Co., 6 Cow. 404; Odlin *v.* Ins. Co. of Pennsylvania, 2 Wash. C. C. 312, 320; Price *v.* DuPeau, 1 Brev. 452; Murray *v.* United Ins. Co., 2 Johns. Cas. 168.

[5] See post, tit. Deviation.

[6] In general the interest of the insured need not be stated, as that he is a part-owner. Oliver *v.* Greene, 3 Mass. 133; Finney *v.* Warren Ins. Co., 1 Met. 16; Rising *v.* Burnett, 2 Marsh. Ins. 730. In Taylor *v.* Wilson, 15 East, 324, it was held that a part-owner who chartered the whole vessel, might insure the freight without specifying his interest. And where the vessel is let by charter-party, this fact need not be mentioned. Hodgson *v.* Mississippi Ins. Co., 2 La. 341. A mortgagee may insure his interest without specifying it. Russel *v.* Union Ins. Co., 1 Wash.

and character of the property;[1] or the sailing without convoy.[2] In general, if the ship or goods, or any part of the goods, are belligerent,[3] or contraband, or if the ship is intended for a

C. C. 409; Bell *v.* Western M. & F. Ins. Co., 5 Rob. La. 423; Williams *v.* Cincinnati Ins. Co., Wright, 542. So, may a trustee, Stetson *v.* Mass. Mut. F. Ins. Co., 4 Mass. 330; Higginson *v.* Dall, 13 Mass. 96; or a consignee, Wolff *v.* Horncastle, 1 B. & P. 316; Wells *v.* Philadelphia Ins. Co., 9 S. & R. 103. In De Forest *v.* Fulton F. Ins. Co., 1 Hall, 84, it was held that a consignee in possession, could insure goods to their full value in his own name. The question as to an insurance under a general description of the interest of a mortgagee, trustee, and of other persons having a special interest in property, was discussed at great length.

If a vessel is built for a person, and delivered over to him with the builder's bond of conveyance upon the payment of a certain sum, and he has the entire possession and use of the vessel, he may represent himself as owner, although the register is in the name of the builder, and that fact is not communicated. Simmes *v.* Marine Ins. Co., 2 Cranch, C. C. 618. In Columbian Ins. Co. *v.* Lawrence, 2 Pet. 25, the application for insurance stated that the property belonged to Lawrence & Poindexter. In point of fact, they held one half of one third, under a lease for three lives, renewable for ever, and one half of the other two thirds as mortgagees; that the other moiety was held under a contract, the terms of which had not been complied with, and which, if complied with, would give them a title to two thirds only as mortgagees. The court held that the nature of the interest should have been mentioned.

A common carrier may insure his interest in general terms. Crowly *v.* Cohen, 3 B. & Ad. 478; Van Natta *v.* Mutual Security Ins. Co., 2 Sandf. 490. And if a common carrier hires a vessel and causes his interest in the cargo to be insured, he need not state who the owners of the vessel are. Chase *v.* Wash. Mut. Ins. Co., 12 Barb. 595. In Clarke *v.* Firem. Ins. Co., 18 La. 431, it was held that as the administrator of his wife's property, the husband has such an interest therein as authorizes him to insure it in his own name during her lifetime, without declaring the nature and extent of his interest. So a husband may insure his interest as tenant by courtesy, without specifying it. Franklin M. & F. Ins. Co. *v.* Drake, 2 B. Mon. 47, 50. In Morrison *v.* Tennessee M. & F. Ins. Co., 18 Mo. 262, A effected insurance and sold the property to B, who reconveyed it to a trustee to secure to A the payment of the purchase-money. Held, that A had an insurable interest, and that he was not bound to state it unless asked. See also, generally, Locke *v.* N. Am. Ins. Co., 13 Mass. 61; Bartlet *v.* Walter, id. 267; Lawrence *v.* Van Horne, 1 Caines, 276.

[1] See post, ch. 6.

[2] Sawtell *v.* Loudon, 5 Taunt. 359, 1 Marsh. R. 99.

[3] Bandy *v.* Union Ins. Co., 2 Wash. C. C. 391; Marshall *v.* Union Ins. Co., 2 Wash. C. C. 357. But if the circumstances are such that the insurer should know the danger of belligerent goods being shipped, and makes no inquiry in regard to them, the character of the goods need not be disclosed. Maryland Ins. Co. *v.* Bathurst, 5 Gill & J. 159; Buck *v.* Chesapeake Ins. Co., 1 Pet. 151. See Barker *v.* Blakes, 9 East, 283; Stocker *v.* Merrimack M. & F. Ins. Co., 6 Mass. 220, 226; Hodgson *v.* Mar. Ins. Co., 5 Cranch, 100. As a general policy covers war risks, a false clearance is immaterial and need not be stated. Barnewall *v.* Church, 1 Caines, 217. In Bowne *v.* Shaw, 1 Caines, 489, there was a warranty against loss "by capture or detention for

blockaded port, the assured must state the fact; for all these things expose the property to forfeiture; and every such danger or liability as this must be made known. But it has been held that an insurance on "all lawful goods," does not require a representation that they are contraband, because the term lawful goods may include goods that are contraband.[1]

If an insured represents that he is the sole owner of goods, he is not estopped from proving the truth of the representation by a bill of lading, representing the goods to belong to him and one other person.[2]

The time of sailing is often a very material fact. It may show that the ship has been, or is to be in a certain part of the

or on account of any illicit trade, or trade in articles contraband of war." The goods covered by the policy on which this suit was brought, were lawful and insured at a premium of nine per cent. Certain contraband articles were shipped by the plaintiffs, as agents, and insured at a premium of thirty per cent. The defendant was aware of this, and was therefore held liable. In Kohne *v.* Ins. Co. of N. A., 1 Wash. C. C. 93, 6 Binn. 219, insurance was effected on a cargo of goods from Newport, Rhode Island, to Port Passage in Spain. The vessel had brought the goods from Laguira, trade being then prohibited between that place and Spain. The court held that the fact of the goods having been so brought should have been communicated. — If the instructions to the master violate any of the rules established by the Court of Admiralty in England, the instructions should be communicated, although such rules are against the law of nations. Sperry *v.* Delaware Ins. Co., 2 Wash. C. C. 243. But see Marsh *v.* Muir, 1 Brev. 133, cited ante, p. 166, n. 1. — It has been held that an assured is not bound to disclose that he emigrated from France to this country at a time when there was war between France and England. Duguet *v.* Rhinelander, 1 Caines, Cas. xxv., 2 Johns. Cas. 476, reversing the same case in the Supreme Court, 1 Johns. Cas. 360. But see Campbell *v.* Innes, 4 B. & Ald. 423. In Coulon *v.* Bowne, 1 Caines, 288, a question arose as to the construction of the following representation: "Mr. Coulon is a naturalized citizen of the United States *since* the year 1794." This was held to mean that he was naturalized after the year 1794.

[1] This was so decided in Seton *v.* Low, 1 Johns. Cas. 1, by the Supreme Court of New York. The decision seems, however, not to have given entire satisfaction to the profession, as the same question again came up in Skidmore *v.* Desdoity, 2 Johns. Cas. 77, De Peyster *v.* Gardner, 1 Caines, 492, and again in Juhel *v.* Rhinelander, 2 Johns. Cas. 120. This case was carried to the Court of Errors, and the principle stated in the text established, at least in New York.

According to many foreign ordinances contraband goods are not included under the general term merchandise. 1 Magens, 9, § 14. Emerigon, ch. 10, scc. 2, Meredith's Ed., 243, lays down the rule that the insurers should be informed of contraband goods, if there are any on board, because of the increased risk; but this would seem to be a reason why the goods should be represented to the insurer as contraband, rather than that they should be described as such in the policy.

[2] Maryland Ins. Co. *v.* Ruden, 6 Cranch, 338.

ocean in a very dangerous season, or the opposite; or that the ship is "out of time."[1] And if the time of sailing be stated

[1] In M'Lanahan *v.* Universal Ins. Co., 1 Pet. 170, 188, Mr. Justice *Story* states the law as follows: "That the time of sailing is often very material to the risk cannot be denied; that it is always so, is a proposition that will scarcely be asserted, and certainly has never yet been successfully maintained. How far it is so, must essentially depend upon the nature and length of the voyage, the season of the year, the prevalence of the winds, the conformation of the coasts, the usages of trade as to navigation, and touching and staying at port, the objects of the enterprise and other circumstances, political and otherwise, which may retard or advance the general progress of the voyage. The material ingredients of all such inquiries are mixed up with nautical skill, information, and experience; and are to be ascertained in part upon the testimony of maritime persons, and are in no sense judicially cognizable as matter of law. The ultimate fact itself, which is the test of materiality, that is, whether the risk be increased so as to enhance the premium, is, in many cases, an inquiry dependent upon the judgment of underwriters, and others, who are conversant with the subject of insurance." The learned judge then goes on to say that the same rule governs in a case of sailing from a home port as in a case from a foreign port. See also, Ratcliffe *v.* Schoolbred, Park, Ins. 249, Marshall, Ins. 468; Fillis *v.* Brutton, Park, Ins. 250, Marshall, Ins. 467; M'Andrew *v.* Bell, 1 Esp. 373; Webster *v.* Foster, 1 Esp. 407; Willes *v.* Glover, 4 B. & P. 14; Kay *v.* Young, Millar, Ins. 62; Shirley *v.* Wilkinson, Millar, Ins. 64; Kirby *v.* Smith, 1 B. & Ald. 672; Elton *v.* Larkins, 5 Car. & P. 86, 8 Bing. 198; Anderson *v.* Thornton, 8 Exch. 425, 20 Eng. L. & Eq. 339; Bridges *v.* Hunter, 1 M. & S. 15; Baxter *v.* New England Ins. Co., 3 Mason, 96; Curell *v.* Miss. Mar. & F. Ins. Co., 9 La. 163; Johnson *v.* Phœnix Ins. Co., 1 Wash. C. C. 378; Livingston *v.* Delafield, 3 Caines, 49; Elkin *v.* Janson, 13 M. & W. 655. But if a knowledge of the time of sailing would not affect the premium it need not be disclosed. Littledale *v.* Dixon, 4 B. & P. 151; Foley *v.* Moline, 5 Taunt. 430. In Williams *v.* Delafield, 2 Caines, 329, the voyage was from Cape François to Baltimore. A statement that the vessel had been out twenty-six days, when she had actually been out twenty-seven, was found by the jury not to be material. See also, Mackay *v.* Rhinelander, 1 Johns. Cas. 408; Chaurand *v.* Angerstein, Peake, N. P. 43; Fort *v.* Lee, 3 Taunt. 381; Rice *v.* New England Mar. Ins. Co., 4 Pick. 439; Fiske *v.* N. E. Mar. Ins. Co., 15 Pick. 310; Alsop *v.* Commercial Ins. Co., 1 Sumner, 451; Maryland & Phœnix Ins. Co. *v.* Bathurst, 5 Gill & J. 159. In Elkin *v.* Janson, 13 M. & W. 655, the underwriter pleaded that at the time of making the policy the plaintiff wrongfully and improperly concealed from the defendant certain facts and information, setting them forth, which were material as showing that the vessel was out of time. To this the plaintiff replied *de injuriâ*, on which issue was joined. On the trial the jury found that the facts were material, but stated that there was no evidence before them on which they could decide whether or not they were communicated to the defendant. The court held that the burden of proof, in the first instance, lay on the defendant to give some evidence of the non-communication, and generally the mere fact of subscribing the policy would be sufficient, and that then the burden would be cast on the other side. In Westbury *v.* Aberdein, 2 M. & W. 267, it was held that, where two vessels sailed from a port at about the same time, and one arrived five days before the policy on the other was effected, it was a question for the jury to decide whether the non-communication of such intelligence materially varied the risk.

incorrectly, the underwriters are not liable, if the time be at all material to the risk.[1] And a policy to and from a place implies that the ship is, or soon will be there, in a condition to sail from the port in a short time.[2] And in this connection, the sailing qualities of the vessel may be material, and therefore should be disclosed; for if she were very fast this would make her still more out of time.[3] But when the insurance is "at and from" a port, it is not, generally, necessary to state how long the vessel has been at the port, nor that she is a prize ship.[4]

The principle which must be clearly apprehended and remembered upon this subject is, that every thing material must be disclosed, and stated truly; and that to determine whether any fact, actual or rumored, is material, we must ascertain whether that fact would naturally and reasonably enter into the estimate of risk, or the reasons for or against entering into the contract of insurance.[5]

There can be no other criterion; and as there are not many

[1] Roberts *v.* Fonnereau, Park, Ins. 244; M'Lanahan *v.* Universal Ins. Co., 1 Pet. 170; Curell *v.* Miss. Mar. & F. Ins. Co., 9 La. 163.

[2] In Hull *v.* Cooper, 14 East, 479, the insurance was at and from Heligoland to a port of discharge in the Baltic. The policy was made out between the 8th and 13th of August while the ship was lying in the Thames, from whence she sailed for Heligoland on the 27th of the same month. Held, that it was a question for the jury whether the period which intervened from the time the policy was made till the vessel reached H. materially varied the risk. The jury found that it did not. See also, Fillis *v.* Brutton, Park, Ins. 250; Ratcliffe *v.* Schoolbred, Park, Ins. 249; Vallance *v.* Dewar, 1 Camp. 503. If the ship will be detained for repairs, this fact need not be communicated to the underwriters. Beckwith *v.* Sydebotham, 1 Camp. 116.

[3] See Littledale *v.* Dixon, 4 B. & P. 151; Ruggles *v.* General Int. Ins. Co., 4 Mason, 74, 82.

[4] Kemble *v.* Bowne, 1 Caines, 75. So under an open policy from St. Thomas to Havana it was held not to be necessary to disclose that the vessel had previously sailed from Alexandria to Buenos Ayres, where a part of the cargo was discharged, and that she sailed thence to St. Thomas. Simmes *v.* Mar. Ins. Co., 2 Cranch, C. C. 618.

[5] Thus in Ingraham *v.* South Carolina Ins. Co., 3 Brev. 522, the captain of the vessel had rendered himself obnoxious to the natives of Congo by his conduct there on a former voyage, and the underwriters refused to insure until the plaintiff represented to them that he had received a letter from his correspondent informing him that the king of Congo approved of the captain's conduct. At the time he made this representation, he had a letter in his pocket stating that the people of Congo were much exasperated against the captain, and would murder him if they could get possession of him. The court held that this letter should have been communicated. See also cases *passim*.

facts which are of themselves always and necessarily material, so there are not many which may not be made so by the circumstances of the case. Hence, too, another rule which has already been intimated; which is, that the assured must make true answer to all questions which the insurer may put to him. These may undoubtedly be so irrelevant or frivolous as to deserve no answer, and such that they cannot be considered material; but in general the insurer may determine for himself what he needs to know in order to estimate the risk aright.[1]

Upon the question, not of law, but of fact, whether any information not communicated by the insured was actually possessed by him, it may be said that intelligence left at his counting-room in season for him to receive it, has been held to be notice to him.[2] But he may, we think, rebut any such presumption by proof of actual and honest ignorance.

The whole object of the rules as to representation, misrepresentation, and concealment is to enable the insurers to judge accurately of the risk they undertake. Hence, the first exception is, that nothing need be communicated to them which they know, however their knowledge may have been acquired.[3] And

[1] Thus, if in answer to the question, "when is the vessel expected to sail?" the party seeking insurance should give the time when she had left another port for the port in question, this would be a material concealment, if at the time he knew when she was expected to sail from the latter port. Himely *v.* South Carolina Ins. Co., 3 Const. R. 154. See also, ante, p. 162, n. 3.

[2] Byrnes *v.* Alexander, 1 Brev. 213.

[3] Thus, in Carter *v.* Boehm, 3 Burr. 1905, 1910, Lord *Mansfield* said: "There are many matters as to which the insured may be innocently silent. He need not mention what the underwriter knows — *scientia utrinque par pares contrahentes facit.* An underwriter cannot insist that the policy is void, because the insured did not tell him what he actually knew; which way soever he came to the knowledge. The insured need not mention what the underwriter ought to know; what he takes upon himself the knowledge of; or what he waives being informed of. The underwriter needs not be told what lessens the risk agreed and understood to be run by the express terms of the policy. He needs not be told general topics of speculation; as, for instance, the underwriter is bound to know every cause which may occasion natural perils; as the difficulty of the voyage, the kind of seasons, the probability of lightning, hurricanes, earthquakes, etc. He is bound to know every cause which may occasion political perils; from the ruptures of States; from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace; from the imbecility of the enemy, through the weakness of their councils, or their want of strength."

There can be no concealment when both parties have an equal opportunity of acquir-

all those matters which are of common and general knowledge, or which it is the peculiar business of insurers to know, will be

ing knowledge of the fact. If, therefore, the party wishing insurance puts into the hands of the underwriter the letter of the captain which contains the information, the underwriter cannot set up ignorance of the fact. Vasse *v.* Ball, 2 Dall. 270, 275.

It was held, in one case, that intelligence posted up at Lloyd's was presumed to be known to the London underwriters. Friere *v.* Woodhouse, Holt, N. P. 572. But in Elton *v.* Larkins, 8 Bing. 198, 5 Car. & P. 86, it was held, that where the intelligence was contained in the foreign lists at Lloyd's, which lists the underwriters were not accustomed to examine, except under peculiar circumstances, the assured should communicate such intelligence if material. And, "if a party subscribe a policy, relying on the representation of the person who comes to effect it, which representation is not consistent with the list, then the list at Lloyd's is no answer to it, because, though the underwriter may have access to such list, and may be presumed to have access to it, where there is nothing to mislead him, yet there may be something upon which he relied that misled him; and where it is manifest that if he had adverted to the list he never would have taken the premium in question, it appears to me that in such a case the presumption that he had looked at the list is entirely rebutted; and it must be considered, in this case, that though he might have looked at the list, he did not, but relied on the representation made to him." Per Lord *Abinger*, C. B., Mackintosh *v.* Marshall, 11 M. & W. 116.

Lloyd's list is evidence against the assured if he is shown to have read it, otherwise not. Bain *v.* Case, 3 Car. & P. 496.

The question has arisen whether marine intelligence, published in the newspapers taken at the office of the underwriters, need be stated. In Dickenson *v.* Commercial Ins. Co., Anthon, N. P. 92, it was held that it must be. But this case turned somewhat on its peculiar circumstances. The plaintiff had applied at one office before he applied to the defendants, and was refused on account of the news in the Gazette. The defendants took the risk at the usual rate, and the court held, that the news should have been communicated. In Green *v.* Merchants' Ins. Co., 10 Pick. 402, 406, *Shaw*, C. J., said: "It may be very true that underwriters are not, under all circumstances, to be presumed to be acquainted with all the intelligence contained in the papers taken at their office. But the general presumption is, that the agents of the office will examine, with some care, those items of marine intelligence, which are expressly designed, speedily to diffuse information upon a subject so immediately interesting to them, especially in relation to vessels belonging to their own port. The court are, therefore, all of opinion that the evidence was rightly admitted, and that it was properly left to the jury as a fact, to decide whether this paper had been received and its contents known at the office; and also, whether the information in the Gazette was the same as that contained in the plaintiff's letter. If so, they were rightly instructed to consider the circumstance that such letter was not produced, immaterial." See also, Alsop *v.* Commercial Ins. Co., 1 Sumner, 451. In Stoney *v.* Union Ins. Co., 1 Harper, 235, 3 McCord, 387, *nom.* Money *v.* Union Ins. Co., 4 McCord, 511, the offer for insurance contained the following clause: "Every circumstance material for the underwriters to know so as to form a just opinion of the risk is stated in the above offer." The question was raised whether the underwriters were discharged by the neglect of the assured to communicate intelligence which was contained in papers taken by the underwriters. It seems to have been held by the court, on the first two

presumed to be known to them. It is extremely difficult to classify the numerous cases on this subject, so as to draw general rules from them, because they are so diverse in their specific facts. But we give, in the notes below, all of them not elsewhere cited, which we think would be found instructive.

Therefore, the existence of public wars,[1] or in general, any public political intelligence,[2] usages of trade,[3] the local situation or peculiar character or extent of a port mentioned or intended,[4] or the fact of there being no pilots,[5] need not be stated.

trials of the case, that the above clause amounted to a declaration on the part of the assured that the underwriters need not inquire into any matter relating to the vessel, nor believe any thing heard in relation to it, as the whole truth had been told. But on the last trial the court held, that the assured were not bound to communicate things to the underwriters which they already knew, and that the jury were warranted in finding that they possessed this knowledge. — If the intelligence is published in the papers before the company is formed, it should be communicated to the underwriters, because there is no presumption that they knew of it, in such a case. Himely *v.* South Carolina Ins. Co., 3 Const. R. 154.

[1] Coulon *v.* Bowne, 1 Caines, 288.

[2] Thomson *v.* Buchanan, 4 Brown, P. C. 482.

[3] Vallance *v.* Dewar, 1 Camp. 503; Moxon *v.* Atkins, 3 Camp. 200; Da Costa *v.* Edmunds, 4 Camp. 142; Maryland & Phœnix Ins. Co. *v.* Bathurst, 5 Gill & J. 159; Buck *v.* Chesapeake Ins. Co., 1 Pet. 151; Planché *v.* Fletcher, 1 Doug. 251; Long *v.* Bolton, 2 B. & P. 209. In Hurtin *v.* Phœnix Ins. Co., 1 Wash. C. C. 400, it was held, that if it was usual on a voyage to Gibraltar, to carry a bill of lading to the Mediterranean, generally the assured was not bound to mention the fact to the underwriters. In Vallance *v.* Dewar, the insurance was "at and from" Newfoundland. After the vessel arrived there she was employed three or four months in bank fishing before she took in her return cargo. The defence was, that the underwriters had not been informed that the vessel was to be so employed, and that the risk was thereby much increased. But it was shown that by the usage of trade on these voyages it was customary to have a separate policy for the vessel while engaged in the fishing business. Lord *Ellenborough* held that the underwriters were presumed to know this usage. See also, Ougier *v.* Jennings, 1 Camp. 505, n. Where the mode of trading resorted to is merely of occasional occurrence, the underwriters are not presumed to know it. Tennant *v.* Henderson, 1 Dow, P. C. 324. In this case the intention to act in concert with another vessel, was held to be a concealment. But it would be otherwise if this was justified by usage. Child *v.* Sun Mut. Ins. Co., 3 Sandf. 26. See Taunton Copper Co. *v.* Merchants' Ins. Co., 22 Pick. 108, and ante, p. 56–61. There is no presumption, because vessels usually stop at a certain place only a short time, that being there on a certain day, the vessel insured must have sailed from there on that day, for her sailing would depend on the weather and on her state of repair. Kirby *v.* Smith, 1 B. & Ald. 672, 675.

[4] Moxon *v.* Atkins, 3 Camp. 200; Kingston *v.* Knibbs, 1 Camp. 508, note; Stewart

[5] Nelson *v.* La. Ins. Co., 17 Mart. La. 289.

For such facts are presumed to be known. An expressed intention to depart from a usage it is said will authorize the departure, unless the policy expressly forbids it, which it may do directly or indirectly; but this may perhaps be doubted.[1]

If enough is honestly said by either party to suggest a doubt to the other party and put him on an inquiry which would have set him right, and he remains in ignorance because he neglects to make such inquiry, this ignorance is not to be imputed to the assured as his concealment.[2]

That intention need not be stated, which, if it be carried into effect, will avoid the insurance or give the insurers a defence; such at least seems to be the rule in respect to an intention to deviate; for if there be no deviation the intention does not discharge the insurers, and if there be one it discharges them, although unintended by the owner. It is, however, obvious that in some cases the mere intention may be such as of itself to enhance the risk; and then, on general principles, it should be disclosed.[3]

v. Bell, 5 B. & Ald. 238; De Longuemere *v.* New York Fire Ins. Co., 10 Johns. 120; Bell *v.* Marine Ins. Co., 8 S. & R. 98. In Stewart *v.* Bell, the insurance was on goods from London to Jamaica. The goods were discharged into shallops at a port near their destination, and were lost in their conveyance to that place. This was shown to be the usual mode of landing goods at that port, and the underwriters were held liable. See also, Mobile Mar. Dock & Mut. Ins. Co. *v.* McMillan, 27 Ala. 77. In De Longuemere *v.* N. Y. Fire Ins. Co., the insurance was from New York to the port of Sisal. There was no harbor at that place, and the vessel lay out several miles from the shore to receive her cargo. The trade with Sisal was recent, and the assured did not communicate the nature of the port to the underwriters. *Kent*, C. J., said: "The defendants took upon themselves the risk of the vessel while at Sisal with all the inconveniences of such an open and exposed shore, equally as they assured the extraordinary perils, if any, of the navigation of the Mexican sea."

[1] See 2 Duer on Ins. p. 668, lect. xiv. § 17; 1 Phillips, Ins. § 602; Middlewood *v.* Blakes, 7 T. R. 162.

[2] See Court *v.* Martineau, 3 Doug. 161; Fort *v.* Lee, 3 Taunt. 381; Alsop *v.* Commercial Ins. Co., 1 Sumner, 451; Carr *v.* Hilton, 1 Curtis, C. C. 390; Freeland *v.* Glover, 6 Esp. 14, 3 Smith, 424, 7 East, 457.

[3] In N. Y. Firem. Ins. Co. *v.* Lawrence, 14 Johns. 46, 59, it was agreed by the whole court that an intention to deviate did not avoid the insurance. See also, Henshaw *v.* Mar. Ins. Co., 2 Caines, 274; Houston *v.* N. E. Ins. Co., 5 Pick. 89. The other rule laid down by *Kent*, J., on the authority of Middlewood *v.* Blakes, that *positive instructions* given to the master to deviate or change the risk should be disclosed, does not seem to be settled.

In Middlewood *v.* Blakes, 7 T. R. 162, the insurance was from England to Jamaica. The captain was instructed to stop at Cape Nicholas Mole. The vessel was captured

It seems, that one requesting insurance need not disclose that he has applied to other insurers and been refused; and if he expresses his opinion as to the terms on which he believes others would insure, this, even if it be false, is said not to discharge the insurers as a material misrepresentation.[1] But a statement, whether direct or implied, that other insurers *have* insured the property when they have not, or at less than the actual rate, is a misrepresentation.[2] A past damage to goods need not generally be stated, because the insurer indemnifies only for future damage; but it should be otherwise if the past damage affects their present probability of preservation or decay.[3] And a person

before her arrival at the latter place, and while on one of the three regular routes to Jamaica. But it appeared that at a certain point in the course it was usual for the captain to select one of the three routes, according to his discretion at that time. The instructions took away that discretion, and he took the route in which he was lost, for the sole purpose of touching at Nicholas Mole. It was held that the underwriters were discharged; and a majority of the court, including Lord *Kenyon*, C. J., placed the decision on the ground that the instructions had not been disclosed; but *Lawrence*, J., placed it on the ground that there had been an actual deviation. The decision has been supported upon the ground taken by *Lawrence*, J., in Talcot *v.* Mar. Ins. Co., 2 Johns. 130, and in Marine Ins. Co. *v.* Tucker, 3 Cranch, 357, and it was intimated that had the loss occurred before the vessel arrived at the dividing line, the insurers would have been liable, thus approving the doctrine that the concealment of *instructions to deviate or change the risk in any way would not avoid a policy*. And this doctrine seems to be supported on principle. If we are to look merely to the question of materiality, we should say that both an *intention* to deviate and *instructions* to deviate should be disclosed, for it is obvious that either of them might influence the mind of the underwriter as to whether he would take the risk, or as to the amount of premium. But the further question arises whether the underwriters are not understood to waive representations of this kind. There seems to be no substantial difference between the concealment of these facts and the concealment of information respecting sea-worthiness. A deviation or any change of risk will discharge the underwriters as well as unseaworthiness, and there appears to be no reason why facts which affect the estimate of the probabilities of the one should be disclosed, while they are not required in the case of the other. In this view there appears to be no difference between a concealment of a mere intention to deviate, and that of instructions to the captain to deviate, as either of them could only have the effect of increasing the probabilities of an event which would discharge the underwriters. See 2 Duer on Ins. 491; 1 Phillips on Ins. § 582, and the able dissenting opinion of Chancellor *Kent* in N. Y. Firem. Ins. Co. *v.* Lawrence, *supra*.

[1] See Ruggles *v.* Gen. Int. Ins. Co., 4 Mason, 74, 83, cited ante, p. 166, note, and Clason *v.* Smith, 3 Wash. C. C. 156, ante, p. 156, n. 4.

[2] See Sibbald *v.* Hill, 2 Dow. P. C. 263, cited ante, p. 155, n. 4.

[3] In Boyd *v.* Dubois, 3 Camp. 133, a lot of hemp insured was destroyed by fire. "The defendant's counsel undertook to prove that the hemp was damaged; and for this reason it was apt to ferment, and take fire." Lord *Ellenborough* said: "If the hemp was put on board in a state liable to effervesce, and it did effervesce and generate

obtaining insurance on a vessel need not generally state the nature and condition of her cargo.[1]

There is one general rule of some importance; it is, that there need be no representation or disclosure of any thing which is distinctly provided for by the policy, whether this is done by an express agreement or warranty, or by a warranty or stipulation which is implied by the law.[2] But even in reference to such things as these, if the insured be interrogated by the insurers, he is bound to make true answers. So, if he volunteers information, it must be true; or not such as would or could mis-

the fire which consumed it; upon the common principles of insurance law, the assured cannot recover for a loss which he himself has occasioned. But I most positively say, that they were not bound to represent to the underwriters the state of the goods. It would introduce endless confusion and perpetual controversies, if such a duty were to be imposed upon the assured." See Gladstone *v.* King, 1 M. & S. 35, ante, p. 162, n. 4.

[1] Chesapeake Ins. Co. *v.* Allegre, 2 Gill & J. 164.

[2] In De Wolf *v.* N. Y. Firem. Ins. Co., 20 Johns. 214, the property was warranted neutral. It was contended that a contract which might have affected its neutral character should have been disclosed. *Spencer*, C. J., said: "If it be conceded that those circumstances did enhance the risk, the answer is decisive that a party need not communicate any thing with respect to a fact, in regard to which there is an express or implied warranty." s. c. in error, 2 Cow. 56. So the age of the vessel, and the place where she was built, need not be disclosed. Popleston *v.* Kitchen, 3 Wash. C. C. 138. See also, Walden *v.* N. Y. Firem. Ins. Co., 12 Johns. 128; Dennis *v.* Ludlow, 2 Caines, 111; Haywood *v.* Rodgers, 4 East, 590; Shoolbred *v.* Nutt, Park, Ins. 300. So a stipulation in a charter-party that the vessel shall carry goods both on and under deck need not be disclosed to the underwriters of a general policy on the freight. Adams *v.* Warren Ins. Co., 22 Pick. 163.

It is said by Mr. *Duer*, and we think, with reason, that this rule should be confined to facts that prove, or tend to prove, the existence of the risk that the warranty is designed to exclude. 2 Duer, Ins. 573. In Murgatroyd *v.* Crawford, 3 Dall. 491, the vessel was warranted to be an American bottom. A contract of sale had been made with an Englishman, by which the original owner was to retain the register of the vessel and insure her, as the voyage on which it was intended to send the vessel was one, which by the laws of England subjected the vessel to forfeiture if owned by an Englishman. It was agreed that after the insurance was effected, the vessel should be delivered up to the vendee, and be sent on the voyage, and that the owner should empower a passenger to transfer the vessel to the vendee at a certain time when he would have become an American citizen. *Shippen*, J., said: "The plaintiff warranted the ship to be an American bottom, which of itself superseded, in our opinion, the necessity of making any communication on the subject of the property. But still, if in the opinion of the jury a knowledge of the circumstances that were suppressed, would have induced the insurer to demand a higher premium, or to refuse altogether to underwrite, it will be sufficient on commercial principles to invalidate the policy."

lead the insurers.[1] But they would have no right to incorporate by evidence such a representation or statement into their contract, if it be distinctly inconsistent with, or if the subject-matter be distinctly included within the policy; for the rules of evidence do not permit any written contract to be enlarged, diminished, or varied by parol evidence.[2] This last remark applies only to an express warranty or agreement; for so far as a representation extends an implied warranty ceases.[3]

SECTION IV.

OF THE CONSTRUCTION OF A REPRESENTATION, AND A COMPLIANCE WITH IT.

In general, every representation or statement will be construed according to the fair and obvious meaning of the words,[4] and will include all just and rational inferences from the words; and

[1] Haywood *v.* Rodgers, 4 East, 590.

[2] In Redman *v.* Lowdon, 5 Taunt. 462, 3 Camp. 503, the insurance was "at and from London to Berbice," and the words "*at sea*" were inserted. A deviation was set up in defence. The assured offered in evidence a letter shown to the underwriters, and other statements made to them, to show that the intention was to insure from the place where the vessel was at sea, to Berbice. *Mansfield*, C. J., at *Nisi Prius*, said: "Whatever the intention of the parties might be, I see nothing in this policy to show that it was not to attach at London. I must therefore hold that the underwriters were discharged by the deviation at Madeira." See also, Atherton *v.* Brown, 14 Mass. 152, and ante, p. 50, n. 2.

But a subsequent written agreement changing the construction of a clause in a policy, has been admitted in evidence. Lothian *v.* Henderson, 3 B. & P. 499; and we have no doubt that in many of the States of this country a subsequent parol agreement would be binding. See ante, p. 36, n. 1.

[3] Walden *v.* N. Y. Firem. Ins. Co., 12 Johns. 128, 135, per *Platt*, J. In Parks *v.* Gen. Int. Ins. Co., 5 Pick. 34, 37, *Wilde*, J., said: "A condition, or an implied undertaking, not expressed in the policy, may be superseded by a verbal or written statement." See also, Emerigon, Meredith's Ed., p. 138.

[4] In Sibbald *v.* Hill, 2 Dow, P. C. 263, the representation was contained in letters. Lord *Eldon* said: "The letters must be taken in their fair and obvious construction, and that an attempt by nice criticisms, to show that they were susceptible of a different meaning, would not do." See Livingston *v.* Maryland Ins. Co., 7 Cranch, 506.

indeed all facts, which, although distinct, are yet necessarily connected with it; as a statement that a ship is American, includes in its meaning that she has the proper documents to prove her so.[1] So, too, a substantial compliance with a representation will be sufficient;[2] and a literal compliance, which is not substantial, will not be sufficient; as where a ship, represented to sail as soon as convoy, sails *before*, it is no compliance with the warranty.[3]

The question as to construction, or compliance, has been found difficult, when the representation has one meaning where it is uttered or where it is sent, and another meaning where the insurance is effected. Thus, a ship owned in New York is insured in Boston on a proposition made in a letter from New York, which letter declares her to be "coppered;"—and this is true of her according to the New York usage and meaning of the word, but not true according to the Boston usage and meaning. Mr.

[1] Steel *v.* Lacy, 3 Taunt. 285. In Kirby *v.* Smith, 1 B. & Ald. 672, there was a representation that the vessel "was all well at Elsineur on the 26th of July." It appeared that she sailed from that port on that day six hours before the vessel, in which the party insured sailed from the same port. *Bayley*, J., remarked: "It is said that communication was made that the ship was all well at Elsineur on the 26th July; but the natural conclusion from that representation would be that she was left there well at that time, which was contrary to the fact." See also, Ratcliffe *v.* Shoolbred, Park, Ins. 249.

[2] In Chase *v.* Wash. Mut. Ins. Co., 12 Barb. 595; it was held that a policy which stated that the underwriters insure S. G. C. & Co. on account of the Western Transp. Co. on merchandise by certain specified boats, although it might justify the inference that the assured were common carriers, would not imply that they were the owners of the boats. In Suckley *v.* Delafield, 2 Caines, 222, it was held that a representation in time of peace, that a vessel should sail in ballast, was substantially complied with, though there was a trunk of merchandise and ten barrels of gunpowder on board. See also, Pawson *v.* Watson, 2 Cowp. 785; De Hahn *v.* Hartley, 1 T. R. 343, 345, per Lord *Mansfield*, C. J.; Farmers' Ins. & Loan Co. *v.* Snyder, 16 Wend. 481. In Sawyer *v.* Coasters' Mutual Ins. Co., 6 Gray, 221, a representation that the vessel had arrived safely at a place on a given day, and was clear of her cargo of grain in bulk, was held not to be substantially complied with by her having entered the harbor with a cargo of grain in bulk on board, on that day.

[3] Thus a representation that a vessel will sail as soon as some others, "calculating to take advantage of their protection," is not complied with by a sailing before them. Alsop *v.* Coit, 12 Mass. 40. In Murray *v.* Alsop, 3 Johns. Cas. 47, it was represented that a bill of sale would be on board to prove the nationality of the vessel. The bill of sale was actually on board. The vessel was captured and the captain denied having it. Held that a substantial compliance with the representation required that it should be produced when the occasion required. See also, Steel *v.* Lacy, 3 Taunt. 285, *supra*; Houghton *v.* Manuf. Mut. F. Ins. [redacted], 8 Met. 114, 123.

Justice *Story* held that the Boston meaning must prevail, because every contract must be construed by the law and usage of the place where it is made.[1] The supreme court held otherwise;[2] making in fact an exception to, or departure from, this rule. We are able to defend this last decision, if at all, only on the ground that the rule in question yielded to what was considered as the intention of the parties.

It should be added, that the forfeiture or other effect of a misrepresentation may be waived, either expressly or impliedly, as by receiving a new premium after a knowledge of the misrepresentation, or by any other act equivalent to a waiver or to a confirmation or renewal of the contract after such knowledge.[3]

Policies sometimes provide expressly for the communication to the insurers of new facts, or of changes in important facts. And it seems to be held and for sufficient reasons, that a noncompliance with stipulations or agreements of this kind, discharges the insurers, even though the policy be transferred to another party with the consent of the insurers.[4]

[1] Hazard *v.* N. E. Mar. Ins. Co., 1 Sumner, 218.

[2] Hazard *v.* N. E. Mar. Ins. Co., 8 Pet. 557. This decision proceeds on the ground that a citizen of one place cannot be presumed to be acquainted with the usages of another, whereas, since underwriters are presumed to know what constitutes sea-worthiness at a foreign port, they should with equal propriety be presumed to know, on a representation, the usage at the place where the vessel lies and where she is described. See ante, p. 144, n. 2.

[3] See ante, p. 25, n. 1. In Allen *v.* Vermont Mut. F. Ins. Co., 12 Vt. 366, it was held that receiving a new premium without knowing of the misrepresentation, would not operate as a waiver of it.

[4] Tennessee Marine & Fire Ins. Co. *v.* Scott, 14 Mo. 46. The policy in this case contained an agreement that if the insured should change masters or owners, notice should be given without delay, and that the insurers might then end the adventure, by returning a *pro rata* premium. The vessel insured was sold and notice given to the insurers and no objection was made by them. Afterwards, in consequence of sickness in the family of the master, another person was appointed as master for the trip, but no notice of this was given. It was contended that the assent of the underwriters to the change of owners discharged the obligation. But the court held that the defendants were not liable.

CHAPTER V.

OF THE PREMIUM.

SECTION I.

WHAT THE PREMIUM IS, AND WHO IS LIABLE THEREFOR.

THE promise of the insurers to indemnify the insured, requires, like all other contracts, a valid consideration: and this consideration is the amount paid for the insurance by the party insured, which is called the Premium.[1] This is usually regarded as due on the delivery of the policy; but in marine insurance, which is now effected in this country almost exclusively by incorporated companies, the premium is usually paid by a promissory note, given when the policy is delivered, or soon after, and called the premium note.

Our policies usually acknowledge the receipt of the premium; but this can be no bar to a suit for it if it has not been paid. The general rule of law is, that a receipt for money is open to evidence, either to qualify it or to controvert it altogether. It is true that generally no written contract is to be varied by oral evidence. But even in a deed for land, where the receipt for the consideration money is acknowledged under seal, the actual payment may be inquired into and any question raised concerning it which does not tend to impeach or invalidate the deed, or vary any of its provisions;[2] and the same rule must certainly be ap-

[1] "The word premium," says Emerigon, "comes either from the word *præmium*, signifying price, or from the word *primò*, because formerly the premium was paid before all, and at the time of signing the policy." Emerigon, ch. 3, s. 1, Meredith's ed., p. 51.

[2] 1 Greenl. Ev. 26, note.

plicable to policies of insurance. But where the validity of the contract depends upon the receipt of the premium, parol evidence is not admissible to contradict the written acknowledgment in the policy.[1]

In England contracts of insurance are made, generally, if not always, by brokers, who make themselves liable to the insurers for the premium, and stand, generally, as regards the underwriters, in the same position as the insured do in this country.[2] And they are allowed to recover the amount from the insured as *money paid*, before they have actually paid it to the underwriters.[3]

The actual owner of the property or interest which is insured, being in fact the party for whose benefit the contract is made, is bound to pay the premium;[4] and this even if the note of an-

[1] Goit *v.* National Protection Ins. Co., 25 Barb. 189.

[2] For cases growing out of the peculiar relations of underwriters and brokers in England, see Airy *v.* Bland, Park, Ins. 34; Edgar *v.* Bumstead, 1 Camp. 411; Edgar *v.* Fowler, 3 East, 222; Grove *v.* Dubois, 1 T. R. 112; Bize *v.* Dickason, 1 T. R. 285; Minett *v.* Forrester, 4 Taunt. 541; Cumming *v.* Forester, 1 M. & S. 494; Koster *v.* Eason, 2 M. & S. 112; Parker *v.* Beasley, 2 M. & S. 423; Houstoun *v.* Robertson, 6 Taunt. 448.

[3] See Power *v.* Butcher, 10 B. & C. 329, cited post, next note. This is allowed on the ground that there are running accounts between the brokers and underwriters, on which the former are credited with the losses, and the latter with the premiums. The consequence of this practice is, that in ordinary cases, *as against the assured*, the underwriter cannot set up that the broker has not paid the premium of which he has acknowledged the receipt. Dalzell *v.* Mair, 1 Camp. 532; De Gaminde *v.* Pigou, 4 Taunt. 246; Anderson *v.* Thornton, 8 Exch. 425, 20 Eng. L. & Eq. 339. But if the assured has fraudulently induced the underwriter to give credit to the broker, the receipt will not estop the underwriter from claiming the premium of the assured. Foy *v.* Bell, 3 Taunt. 493. And so, where there is fraud on the part of the broker and the assured. Mavor *v.* Simeon, 3 Taunt. 497, note.

But it seems always to have been admitted in England that the policy would not be conclusive evidence of the payment of premium between the underwriter and broker. See the argument of *Best*, Sergt., in Foy *v.* Bell; Cumming *v.* Forester, 1 M. & S. 494. And it cannot be doubted that in the United States, when the underwriter looks in the first instance to the assured for the premium, the policy would not be conclusive evidence of its payment. Ins. Co. of Penn. *v.* Smith, 3 Whart. 520.

[4] The practice in England in effecting insurances and paying premiums, is thus described by *Bayley*, J., in Power *v.* Butcher, 10 B. & C. 329, 340: "According to the ordinary course of trade between the assured, the broker and the underwriter, the assured do not, in the first instance, pay the premium to the broker, nor does the latter pay it to the underwriter. But as between the assured and the underwriter the premiums are considered as paid. The underwriter, to whom, in most instances, the assured are unknown, looks to the broker for payment, and he to the assured. The

other is taken who is agent or broker for the principal,[1] unless the insurers knew that the agent was not acting for himself. In that case they are to be considered as electing to take the liability of the agent or broker, and can look no further.[2] But they do not elect to take the agent, when they do not know that he is not the principal, or that there is another principal to whom they might look.[3] Our policies usually contain a clause giving the insurers a right to deduct, or set off the premium due, against a loss. They would have this right as against the insured without any express agreement; but this clause secures to them their right, although the premium consist of the note of another party, if the note be unpaid.[4]

latter pay the premiums to the broker only, and he is a middle-man between the assured and the underwriter. But he is not solely agent; he is a principal to receive the money from the assured, and to pay it to the underwriters." But in this country there can be no question but that the underwriter can look to the assured in the first instance.

[1] Ins. Co. of Penn. *v.* Smith, 3 Whart. 520. See Paterson *v.* Gandasequi, 15 East, 62, 2 Smith, Leading Cases, 222, note. But if the agent signs the note in his own name the principal is not liable on the note. Stackpole *v.* Arnold, 11 Mass. 27.

[2] Patapsco Ins. Co. *v.* Smith, 6 Harris & J. 166; Paterson *v.* Gandasequi, 15 East, 62.

[3] Ins. Co. of Penn. *v.* Smith, 3 Whart. 520. The policy in this case was of such a form that others might be interested, but not necessarily, and it was held that the taking the note of the agent was not a waiver of the right to look to the principal. But if the agent applies for insurance "for self and others," and the underwriters take the note of the agent only, the principals are not liable, though they were not known when the insurance was effected. Patapsco Ins. Co. *v.* Smith, 6 Harris & J. 166.

[4] In Hurlbert *v.* Pacific Ins. Co., 2 Sumner, 471, the insurance was for "H. & Co. for whom it may concern, payable to H. & Co.," and by a clause in the policy all sums due to the company *from the insured* when the loss should become due, were to be deducted. H. & Co. were mere agents for the parties in interest. It was held, in an action brought by H. & Co., for the benefit of the parties in interest, that the company could not set off debts due from H. & Co. in their own right; but that the premium note, whether given by the agent or principal, was to be deducted, and that the words, *the assured*, applied not to the party who procured the insurance, but to him for whose benefit it was made. See also, Wiggin *v.* American Ins. Co., 18 Pick. 158; Wiggin *v.* Suffolk Ins. Co., 18 Pick. 145, cited ante, p. 42, note.

SECTION II.

OF THE RETURN OF THE PREMIUM.

The premium, although due and payable in one sense as soon as the policy is made, is, in another, not due, unless that risk is incurred for insurance against which the premium is paid.[1] If, therefore, there be no such risk, the premium cannot be claimed if it has not been paid, and if it has been paid by cash or by a note, it must be returned. This rule gives to the insured the power of avoiding the contract, in whole or in part after it is made; because this contract is, substantially, a promise by the insurers to indemnify the insured against a certain risk if that risk be incurred, and a promise of the insured in return to pay the premium to the insurers if their promise of indemnity attaches. If no part of the risk attaches, either because no part of the goods is shipped,[2] or because no part of the voyage takes place,[3] or because the insurance was predicated on a fact about which the parties were mistaken,[4] or because the insured had no interest,[5] or because the vessel was

[1] In Tyrie *v.* Fletcher, 2 Cowp. 666, Lord *Mansfield*, C. J., states the law as follows: "There are two general rules established, applicable to this question: the first is, that where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned; because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured, and whatever cause it be owing to, if he does not run the risk, the consideration, for which the premium or money was put into his hands, fails, and, therefore, he ought to return it. 2. Another rule is, that if that risk of the contract of indemnity has once commenced, there shall be no apportionment or return of premium afterwards."

[2] Martin *v.* Sitwell, 1 Show. 156; Graves *v.* Mar. Ins. Co., 2 Caines, 339; Waddington *v.* United Ins. Co., 17 Johns. 23; Scriba *v.* Ins. Co. of N. A., 2 Wash. C. C. 107; Toppan *v.* Atkinson, 2 Mass. 365; Bermon *v.* Woodbridge, 2 Doug. 781; Richards *v.* Mar. Ins. Co., 3 Johns. 307; Murray *v.* Col. Ins. Co., 4 Johns. 443.

[3] Forbes *v.* Church, 3 Johns. Cas. 159; Murray *v.* Col. Ins. Co., 4 Johns. 443.

[4] As a blockade. Taylor *v.* Sumner, 4 Mass. 56.

[5] Routh *v.* Thompson, 11 East, 428. In this case a Danish vessel was captured and taken into port before war was declared against Denmark, though subsequent to a proclamation by the king in council to detain and bring into port all Danish vessels. Insurance was made by order and on account of the captors. Held, that the captors had no claim of right, but only *ex gratia* of the crown, the vessel being seized before

unseaworthy and consequently the risk never attached,[1] the whole premium is returnable. And, generally, the premium is to be returned if the risk never commenced on account of a breach of warranty.[2]

But the assured cannot annul the insurance by serving on the underwriters a notice of his desire to put an end to the contract, if the voyage is not actually abandoned.[3]

Many insurance companies by a clause in their policies, retain one half of one per cent. on the premium returnable; but in some cases, other terms are agreed upon for the return premium. This half per cent. is allowed by foreign laws of insurance, and may have been derived from them.[4] If the policy is on time at an entire premium, there is no apportionment, although the loss

war was declared, and that they had no insurable interest and were entitled to a return of premium. In the subsequent case of M'Culloch *v.* Royal Exch. Ass. Co., 3 Camp. 406, Lord *Ellenborough* ruled that if the premium was paid, and it afterwards appeared that the insured had no insurable interest, he could not recover back the premium after the safe performance of the voyage. This case, we think, is manifestly incorrect. The head note of Boehm *v.* Bell, 8 T. R. 154, seems to support Lord *Ellenborough's* doctrine, but the case was decided on the ground that as the captors had an insurable interest, they could not recover back a portion of the premium, although their interest was not so great as they expected.

[1] Porter *v.* Bussey, 1 Mass. 436; Taylor *v.* Lowell, 3 Mass. 331; Penniman *v.* Tucker, 11 Mass. 66; Russell *v.* De Grand, 15 Mass. 35, 38; Merchants' Ins. Co. *v.* Clapp, 11 Pick. 56; Commonwealth Ins. Co. *v.* Whitney, 1 Met. 21, 23; Scriba *v.* Ins. Co. of N. A., 2 Wash. C. C. 107.

[2] Murray *v.* United Ins. Co., 2 Johns. Cas. 168; Elbers *v.* United Ins. Co., 16 Johns. 128; Colby *v.* Hunter, 3 Car. & P. 7; Delavigne *v.* United Ins. Co., 1 Johns. Cas. 310; Duguet *v.* Rhinelander, 1 Johns. Cas. 360. But not if the breach is subsequent to the attaching of the risk. Vos *v.* United Ins. Co., 2 Johns. Cas. 180.

[3] New York Fire M. Ins. Co. *v.* Roberts, 4 Duer, 141.

[4] Emerigon, ch. 16, § 6, Meredith's Ed., p. 662, says: "The half per cent. which is due to the insurers in case of return, is granted them, not for damages and losses for the non-execution of the contract by the act of the assured, as Pothier pretends (n. 181), but rather for the trouble of having signed and put the party to bed on their money." The practice prevails at Lloyds, where there is no stipulation against it. Stevens on Average, 206; 2 Arnould, Ins. 1238. It is the practice with many underwriters in the United States to insert a clause, fixing the percentage to be retained, in case the premium is returned. But we are not aware that it is the practice to retain part of the premium where there is no stipulation in regard to it. In Boston the usage is for the underwriter to return the whole premium. According to the usage on the continent, the one half per cent. is not to be returned in case the underwriter has been guilty of fraud. Emerigon, Meredith's Ed., p. 663. This usage is in accordance with the common law principle that money cannot be held, when obtained by fraud. See Marsh. on Ins. 677.

takes place when only a small portion of time has expired.[1] And the rule is the same if a gross sum is to be paid at once, although it be calculated at a specified rate per month.[2] So if insurance is effected "at and from" a place, it is no defence that the risk "from" the place was never incurred;[3] or that the ship was unseaworthy at the inception of the voyage if the risk once attached.[4] And an action for the return of premium on account of short interest, will not lie if the interest of the party to the extent insured was covered at any time during the voyage.[5] But if a vessel is insured "at and from a port warranted to depart with convoy,"[6] or to sail on or before a certain day,[7] the risk is severable, if a usage to that effect is proved. So if the

[1] Tyrie *v.* Fletcher, 2 Cowp. 666.

[2] Loraine *v.* Thomlinson, 2 Doug. 585. In Lovering *v.* Mercantile Mar. Ins. Co., 12 Pick. 348, a ship was insured for twelve months or until her arrival, at four and a half per cent. per annum, and at the same rate for a longer or a shorter period, but warranting two and a half per cent. for six months. The assured was not entitled to abandon for capture or detention until proof should be exhibited of the detention having continued ninety days. The ship was captured just before the expiration of the six months, and, after proof of detention for ninety days was exhibited, was abandoned. The abandonment was held to relate back to the time of the capture, and the underwriters to be entitled to a premium for only six months.

[3] Col. Ins. Co. *v.* Lynch, 11 Johns. 233; Marine Ins. Co. of Alexandria *v.* Tucker, 3 Cranch, 357.

[4] Annen *v.* Woodman, 3 Taunt. 299; Taylor *v.* Lowell, 3 Mass. 331; Merchants' Ins. Co. *v.* Clapp, 11 Pick. 56.

[5] Howland *v.* Comm. Ins. Co., Anthon, N. P. 26.

[6] Stevenson *v.* Snow, 3 Burr. 1237. In this case the insurance was on a vessel "lost or not lost at and from London to Halifax, warranted to depart with convoy from Portsmouth for the voyage." The jury found that there was a usage in such a case to return part of the premium, without finding the proportion. Lord *Mansfield* held the risk severable, not on the ground of usage because that was indefinite, but because "the principle was agreeable to the general sense of mankind." In Long *v.* Allan, 4 Doug. 276, the risk was held to be divisible on the express ground of usage. In Gale *v.* Machell, 2 Marsh. Ins. 3d Ed. 667, Park, Ins. 529, the question was not settled. See also, Rothwell *v.* Cooke, 1 B. & P. 172.

[7] In Tyrie *v.* Fletcher, 2 Cowp. 666, Lord *Mansfield*, C. J., said: "A case of general practice was put by Mr. Dunning where the words of the policy are, 'at and from, provided the ship shall sail on or before the 1st of August.' A loss in port before the day appointed for the ship's departure, can never be coupled with a contingency after the day: but if a question were to arise about it, as at present advised, I should incline to be of opinion, that it would fall within the reasoning of the determination in Stevenson *v.* Snow, and that there were two parts or contracts of insurance, with distinct conditions." See also, Long *v.* Allan, 4 Doug. 276; Scott *v.* Rae, cited 2 Doug. 787. But in other cases where no usage was shown, the risk was held to be entire. Meyer *v.* Gregson, 3 Doug. 402; Hendricks *v.* Com. Ins. Co., 8 Johns. 1.

voyage is composed of severable passages, for which the risk is severable, a *pro rata* premium may be returnable because some of those passages were prevented. But generally, if the premium is entire, the risk is not severable, although the voyage consist of several passages.[1] If the insurance be on two subject-matters, as ship and cargo, and the ship goes without cargo, the premium on the cargo will be returnable.[2] And if a part only of the goods is shipped, then a due proportion of the premium is earned and a due proportion returnable.[3]

[1] Thus in Bermon *v.* Woodbridge, 2 Doug. 781, the insurance was on a vessel "at and from Honfleur to the coast of Angola, during her stay and trade there, at and from thence to her port or ports of discharge in St. Domingo, and at and from St. Domingo back to Honfleur." The vessel deviated after leaving the coast of Angola. It was held that no part of the premium was returnable. See also, Moses *v.* Pratt, 4 Camp. 297; Tait *v.* Levi, 14 East, 481. In Homer *v.* Dorr, 10 Mass. 26, the insurance was on a cargo from Boston to Archangel and back to Boston. The risk was held entire, although the usage in Boston was shown to be to sever it. And the same rule applies to charter-parties. See ante, Vol. I. p. 259. In Waters *v.* Allen, 5 Hill, 421, the insurance was at and from New York to Monte Video and Buenos Ayres, and at and from thence back to New York. The premium was one and three quarters per cent. each way. Held that, otherwise, the contract would have been entire. And the risk was held to be severable in a case where the court said the spirit of the agreement showed that the parties so intended. Donath *v.* N. A. Ins. Co., 4 Dall. 463, 471.

[2] Amery *v.* Rogers, 1 Esp. 207. In Horneyer *v.* Lushington, 15 East, 46, the insurance was for £3,500 on cargo and £1,000 on ship. The policy on the ship was avoided by the carrying of simulated papers, and that on the cargo because it was not loaded at the place agreed. No question appears to have been made as to the return of premium on the ship, but Lord *Ellenborough* said: "It seems to me, therefore, that under the terms of this policy, the risk upon the *goods* never commenced, and there must be therefore a proportional return of premium."

[3] In Holmes *v.* United Ins. Co., 2 Johns. Cas. 329, the insurance was to the amount of $25,000, interest as might appear. The plaintiff's interest was less than $13,000. There was a proportionable return of premium. *Kent*, J., said: "There is no doubt but that if property be insured to a larger amount than the real value, the overplus premium is recoverable, because the insurer shall not receive the price of a risk which he has not run." In Pollock *v.* Donaldson, 3 Dallas, 510, the insurance was on cargo for six months "to be valued *as interest shall appear*." On a voyage from Hamburg to Dunkirk, the value of the cargo was $5,333, from Dunkirk back to Hamburg, $1,500, and from Hamburg to Philadelphia, $2,500.

The underwriters contended that fifteen per cent. premium should be allowed for the whole $5,333. But the court "allowed the premium of fifteen per cent. upon the value of the different cargoes for the time that they were respectively on board the brig." See also, Forbes *v.* Aspinall, 13 East, 323; Foster *v.* United States Ins. Co., 11 Pick. 85; Eyre *v.* Glover, 16 East, 218. The same rule applies if the cargo be valued and only a part of the valued cargo be placed on board. See ante as to valued policies.

So if the subject-matter is so erroneously described that the policy does not attach, the premium is returnable; and this whether the error existed in the description itself, or the property was changed by the insured before the policy attached, so as to be without the reach and scope of the policy.[1] So if the policy is issued by a person who had no authority to issue it.[2] Although the parties may, after the contract is made, mutually agree to rescind it, in which case no action can be maintained on the premium note; yet where an insurance company, having become insolvent, voted to cancel its policies, and of this the insured had notice, but did not take any steps to have his policy cancelled, it was held that he was liable on the premium note.[3]

If an insurance be effected by one as agent, who becomes responsible for the premium, and the supposed principal does not adopt the transaction, it should seem that the insurers have still a right to the premium, if the principal could, by an adoption and confirmation of the policy, have entitled himself to claim of the insurer in case of a loss; for they have incurred the risk.[4]

[1] In Robertson *v.* United Ins. Co., 2 Johns. Cas. 250, the insurance was on the ship. The only interest of the assured was as the holders of a bottomry bond. It was held that their interest was not covered under the general description, and that the premium should be returned. Emerigon, c. vi., § 3, Meredith's Ed. p. 129, mentions a case where a sloop was described as a ship, and the court held the insurance void, and ordered the premium to be returned. See next chapter as to description of subject-matter.

[2] Lynn *v.* Burgoyne, 13 B. Mon. 400.

[3] Alliance Mut. Ins. Co. *v.* Swift, 10 Cush. 433.

[4] In Hagedorn *v.* Oliverson, 2 M. & S. 485, and in Finney *v.* Fairhaven Ins. Co., 5 Met. 192, the insurance was effected for parties in interest without authority from them. The question was whether they could ratify the act after a knowledge of the loss, so as to recover on the policy. It was held that they could, and the decisions were placed upon the ground that after the commencement of the risk, the insurers would not have been liable to return the premium, even if the parties for whom the insurance had been effected had refused to ratify it. In Hagedorn *v.* Oliverson, p. 491, *Le Blanc*, J., said: "I take it, that after the ship sailed on the voyage insured, the plaintiff" (the agent) "was bound by the insurance, and could not have recovered back the premium from the underwriter, by averring that this was a policy without interest; the answer would have been Schroeder" (the owner) "is interested, and he may elect to adopt the insurance." See also, Routh *v.* Thompson, 13 East, 274, 289. In Steinbach *v.* Rhinelander, 3 Johns. Cas. 269, the majority of the court seemed to be of opinion that, in a case of this kind, the agent could recover the premium; but

But this must be confined to insurances effected for parties in interest, who have given some authority or appearance of it, to the agent. It cannot be that any person may make any owner or shipper liable for full premiums, without that owner's desire or knowledge, merely because that person calls himself their agent, and they have the power of adoption and ratification.

The general rules which we have already considered, apply to the case of successive risks under the same policy as well as to a single voyage. Thus, if on an open policy the underwriters agree to insure all shipments on account of the insured made between certain ports within a fixed time, at a certain rate for each shipment according to its value, the insured is bound to pay the premium for every shipment.[1] But it would seem that if the policy was intended to cover only such shipments as the insured might elect to have indorsed, he would be liable for the premiums for no others. In other words the underwriters are only entitled to the premiums if they would have been liable if the goods had been lost.[2]

The doctrine of proportional or *pro rata* return of premium

Kent, J., gave a very able dissenting opinion in accordance with the doctrine laid down in the above cases.

In Foster *v.* United States Ins. Co., 11 Pick. 85, a part-owner effected insurance without authority for another part-owner, and after a loss, brought an action on the policy in his own name. The insurers defended on the ground that the other part-owner never ratified the contract, and that it was therefore void. The court held the contract to be void, and that the premium should be returned. This case is supposed by Mr. Phillips, 2 Vol. § 1827, to be in contradiction of the doctrine in the cases first cited in this note. But it does not so appear to us, and evidently was not so regarded by the court in Finney *v.* Fairhaven Ins. Co., *supra*.

The principle upon which those cases must rest, seems to be that of estoppel. As the agent does not assume to contract for himself, but only under an authority which proves to be void, he cannot be said to be bound by any actual contract. But as, by holding himself out as agent, he has induced the underwriter to run the risk of the owners' ratifying his act, he is estopped to set up that he had no authority. But if, as in the case of Foster *v.* United States Ins. Co., the underwriters set up the want of authority, and urge that there is no contract on that ground, it is obvious that there is no reason why the agent should not recover the premium. See also, Finney *v.* Warren Ins. Co., 1 Met. 16.

[1] New York Fire M. Ins. Co. *v.* Roberts, 4 Duer, 141.

[2] See E. Carver Co. *v.* Manufacturers' Ins. Co., 6 Gray, 214; Douville *v.* Sun Mutual Ins. Co. of New York, 12 La. Ann. 259.

can hardly be considered quite settled. Our notes already made, show that the cases conflict with each other, and some of them at least, with acknowledged principles of insurance. The difficulty is in deciding when the premium is entire, and the risks also compose an inseparable whole, such that the beginning of a part is the beginning of the whole, and there can be no return of premium. Thus, if the insurance be on cargo "to and from" a certain place, and the ship arrives safely out and no return cargo is nor can be provided, should the premium on the voyage "from" be returned?

In the present state of the authorities, the best conclusions would seem to be those we have already indicated. To restate them, in other words, the parties may agree beforehand and indicate in any way they please in the policy itself the terms and conditions of a return of premium; if the premium is entire, the presumption is, that it is not to be severed or returned in part; but this presumption may be rebutted, either by provisions of the policy indicating a different intention; or by a reasonable usage sufficiently established. There seems to be no necessity for any provision in the policy or any special usage to give the assured a right to a partial return of his premium for "short interest" or a deficiency in the subject-matter insured.

If there be many simultaneous policies on the same subject-matter, no one of which is beyond the interest, but all together are, as all make but one insurance, with mutual claim of contributions, there is a return of premium paid *pro rata* by all. If the policies are not simultaneous, the same rule seems to apply except in cases where the later ones were not made until after the former ones attached. Then it would seem that as a part of the earlier policies might have been held without claim of contribution, for the loss of the whole property they insured, if that has taken place before the later policies were made, there should be no return of premium from these earlier policies; and it should follow that the later policies, made after the whole interest was covered, should return *pro rata*, according to the excess of the premium over what they could in any event have been liable to pay. But we think this whole subject stands

in an obscure position, and needs the light of further adjudication.[1]

The policies of this country usually contain a provision, that the insurers shall return the premium upon so much of the interest insured as they shall be discharged from by any prior insurance;[2] and this clause, of course, is not applicable to an excess

[1] The authorities cited ante, p. 98, 99, show that according to the modern English rule and the rule in the United States, unless affected by the "American clause," where there are several policies, whether simultaneous or not, covering in the aggregate an amount of property larger than that actually at risk, the loss, if any, must be borne by each insurer in proportion to the amount subscribed by him. It would seem to follow, from this rule, that if a part of the premium is, under like circumstances, to be returned for short interest, the return must be made by each in proportion to the amount subscribed. The practical inconvenience of this rule has been pointed out by Mr. Stevens (Stevens on Average, p. 205), and by Mr. M'Culloch (M'Culloch's Com. Dict. tit. Marine Ins. p. 702), but it appears to be in accordance with the general principles of the common law. See ante, p. 98, n. 1, and Marsh. on Ins. 649; 2 Arnould on Ins. 1228. The late case of Fisk *v.* Masterman, 8 M. & W. 165, has introduced the very reasonable modification of this rule laid down in the text. In that case insurance was effected on cotton, then on its way from Mobile to Liverpool. On the 12th of April it was insured by several underwriters to the amount of £14,150; and on the 13th, to the amount of £22,300. For most of the insurance effected on the 12th a premium of fifty guineas per cent. was paid, as the vessel was then out of time. But for the insurance effected on the 13th only from five to ten guineas per cent. was paid, as the vessel had in the mean time been heard from. The whole amount of property on board was valued at about £30,000. An action was brought against one of the underwriters, who subscribed on the 12th, for a return of premium for over-insurance. The principle was urged that each underwriter should return his proportion of the premium without regard to the time of his subscription, and the authority of Mr. *Marshall* was cited. *Parke*, B., said: "The cases put by Marshall on Insurance, are where the insurance was effected before the risk commenced." It was held, that the underwriters who subscribed the policies on the 13th could retain their entire premiums, on the ground that between the 12th and 13th they would have been liable to the whole amount of their subscriptions had a loss occurred; but that the underwriters who subscribed the policies on the 13th should contribute ratably. It is obvious that the *reason* on which this decision is based, will only apply to cases where the risk actually commences under the first insurance before the second is effected, and the language of *Parke*, B., as above cited, seems to indicate that he supposed the rule to be confined to such cases. Mr. *Arnould*, however, appears to regard the doctrine of this case as of more general application. 2 Arnould on Ins. 1229, 1230.

If the insurers first subscribing, in a case like this, are to retain their entire premiums, it should follow that they will be liable to the full amount of their subscriptions, and that the subsequent underwriters will only contribute ratably. See ante, p. 99, n. 1.

[2] In New York Ins. Co. *v.* Thomas, 3 Johns. Cas. 1, the policy stipulated to return fifteen per cent., "in case an insurance had been effected in Europe." It also con-

of insurance by simultaneous policies.[1] When there was over-insurance on the same policy, as where several underwriters subscribed the same instrument, it was formerly held that the first underwriters were held for the whole, and the subsequent ones discharged.[2] But the law is otherwise now.[3]

Clauses have frequently been inserted in policies making the premium returnable on certain contingencies, as if the vessel sails with convoy and arrives; in which case, although a large part of the cargo insured is lost, if the vessel sails with convoy and arrives, the underwriters are liable.[4]

tained the following clause: "Provided, that if the assured shall have made any other assurance upon the premises prior in date to this policy, then the insurers shall be answerable only for so much as the amount of such prior insurance may be deficient, etc., and shall return the premium on so much of the sum assured as they shall by such prior assurance be exonerated from." Held, that the former clause referred to a prior insurance, and that there was to be no return for a subsequent insurance.

[1] Wiggin *v.* Suffolk Ins. Co., 18 Pick. 145, 153; Potter *v.* Mar. Ins. Co., 2 Mason, 475.

[2] African Ins. Co. *v.* Bull, 1 Show. 132.

[3] See ante, p. 96–99.

[4] Simond *v.* Boydell, 1 Doug. 268. See also, Aguilar *v.* Rodgers, 7 T. R. 421; Horncastle *v.* Haworth, Marsh. on Ins. 674; Audley *v.* Duff, 2 B. & P. 111; Castelli *v.* Boddington, 1 Ellis & B. 66, 16 Eng. L. & Eq. 127. In Langhorn *v.* Allnutt, 4 Taunt. 510, the jury found that in case of a total loss on goods, the premium could not be recovered in addition to a total loss, although the event on the happening of which the premium was to be returned had taken place. The reason assigned was, that the amount of the premium might be added to the invoice price in making up the amount to be included in the total loss.

In Ogden *v.* N. Y. Firem. Ins. Co., 12 Johns. 114, the voyage insured was from Malta to St. Petersburg, fifteen per cent. to be returned, "if the risk ends in safety at Gottenburg." It was held, that it was not necessary, in order to secure a return of premium, that the vessel should actually arrive in safety at Gottenburg; but that the effect of this clause was to divide the risk, and that the fifteen per cent. was to be returned in case the risk from Gottenburg to St. Petersburg was not run. In Robertson *v.* Columbian Ins. Co., 8 Johns. 491, a condition on which the premium was to be returned, was that "the risk end safely." The part of the premium was returned, although the ship suffered much damage on the voyage, the underwriters having been discharged from the loss by a deviation. But it seems that if the condition is the *arrival of the vessel*, it must actually arrive, and it will not be sufficient, if the arrival is prevented by the happening of an event which discharges the underwriters. Kellner *v.* Le Mesurier, 4 East, 396. See also, Dalgleish *v.* Brooke, 15 East, 295.

In Hunter *v.* Wright, 10 B. & C. 714, the stipulation, in a policy on a vessel for one year, was "for a return of part of the premium, if sold or laid up, for every uncommenced month." The vessel was laid up during several months, but was employed again during the year. It was held, that no part of the premium need be returned.

If there be any illegality or fraud on the part of the insurer, as if, before he makes the policy, he knows that the risk has terminated safely, he must return the premium, because he has never assumed the peril for which it pays.[1] But, generally, the mere avoidance of the contract of insurance by reason of illegality gives no right to return of premium, because both parties are equally in the wrong; and the maxim, *in pari delicto potior est conditio possidentis*, applies.[2] If, however, the illegality of the insurance was known to neither party when it was effected, the premium must be returned.[3] If the policy is

Lord *Tenterden*, C. J., said: "I am of opinion that the words *laid up* being in company with the word *sold*, must mean a permanent laying up, similar to that which would take place if the ship had been sold; that is, such a laying up as would put a final end to the policy." In Poutz *v.* La. Ins. Co., 16 Mart. La. 80, it was held, that the entry of French troops into Spain was an act of war within a clause in the policy providing for a return of part of the premium in case no act of war took place between France and Spain, although war had not been formally declared.

[1] In Carter *v.* Boehm, 3 Burr, 1905, 1909, Lord *Mansfield*, C. J., said: "The policy would equally be void against the underwriter if he concealed; as if he insured a ship on her voyage, which he privately knew to be arrived: and an action would lie to recover the premium." See also, Duffell *v.* Wilson, 1 Camp. 401.

[2] Lowry *v.* Bourdieu, 2 Doug. 468; Andree *v.* Fletcher, 3 T. R. 266; Vandyck *v.* Hewitt, 1 East, 96; Morck *v.* Abel, 3 B. & P. 35; Lubbock *v.* Potts, 7 East, 449; Cowie *v.* Barber, 4 M. & S. 16; Juhel *v.* Church, 2 Johns. Cas. 333. Consequently the underwriter cannot maintain an action on a premium note if the insurance was illegal. Russell *v.* De Grand, 15 Mass. 35. In Browning *v.* Morris, 2 Cowp. 790, Lord *Mansfield*, C. J., said, after stating the general rule: "But where contracts or transactions are prohibited by positive statute, for the sake of protecting one set of men from another set of men; the one from their situation and condition being liable to be oppressed or imposed upon by the other; there the parties are not in *pari delicto*." It has, therefore, been held, that the premium paid for insuring lottery tickets may be recovered back. Jaques *v.* Golightly, 2 W. Bl. 1073; Jaques *v.* Withy, 1 H. Bl. 65. See also, Lacaussade *v.* White, 7 T. R. 535. The question has arisen whether a party effecting an illegal insurance, and having paid the premium, has not a *locus pœnitentiæ*, so that he can rescind the contract, and recover the premium, before a loss occurs. It was held that he might, in Tappenden *v.* Randall, 2 B. & P. 467; Wharton *v.* De La Rive, Park, Ins. 513; and in Aubert *v.* Walsh, 3 Taunt. 277. This view is also supported by *Buller*, J., in Lowry *v.* Bourdieu, 2 Doug. 468. But in Palyart *v.* Leckie, 6 M. & S. 290, it was held, that, to entitle the assured to recover back the premium in such a case, he must have made a formal renunciation of the contract prior to the bringing of the action, although the adventure had never commenced; and Lord *Ellenborough*, C. J., expressed his regret that the rule of *locus pœnitentiæ* was ever adopted.

[3] Thus, where the insured is the subject of a foreign country, with which war has been declared, if the parties are ignorant of it at the time the insurance is effected, the premium may be recovered back. Oom *v.* Bruce, 12 East, 225; Henry *v.* Staniforth, 4 Camp. 270; Hentig *v.* Staniforth, 5 M. & S. 122.

avoided *ab initio* by a misrepresentation or concealment, the premium is to be returned,[1] unless the assured had been guilty of fraud.[2]

If the premium has not been paid, then the right to a return of it becomes simply a defence against any claim for it. But if it was paid by a negotiable note, which has been — or perhaps if it only might have been — put into circulation, the insured being liable upon it to a third party, he is entitled to his return premium in the same way as if he had paid it in cash.[3] If a policy be assigned, the right to a return of premium does not pass with it.[4]

[1] Anderson *v.* Thornton, 8 Exch. 425, 20 Eng. L. & Eq. 339; Feise *v.* Parkinson, 4 Taunt. 640.

[2] It seems formerly to have been the practice in Chancery to decree a return of premium, when a policy was decreed to be delivered up on the ground of fraud. See Wilson *v.* Ducket, 3 Burr. 1361, per Lord *Mansfield*, C. J.; Whittingham *v.* Thornburgh, 2 Vernon, 206; De Costa *v.* Scandret, 2 P. Wms. 170. And per *Lewis*, J., in Delavigne *v.* United Ins. Co., 1 Johns. Cas. 310. In Wilson *v.* Ducket, Lord *Mansfield* was in doubt whether in such a case the premium should be returned in a court of law or not. It was not necessary to decide the question in that case, as the premium was brought into court by the insurer. But it is now settled that in a court of law where there is actual fraud on the part of the assured, the premium is not returnable. Tyler *v.* Horne, Park, Ins. 285, Marsh. on Ins. 652; Chapman *v.* Fraser, Park, Ins. 286.

In Hoyt *v.* Gilman, 8 Mass. 336, 340, the assured fraudulently withheld information material to the risk. It was held, that he was entitled to no return of premium. See also, Schwartz *v.* U. S. Ins. Co., 3 Wash. C. C. 170; Himely *v.* S. Car. Ins. Co., 3 Const. Rep. 154. In Langhorn *v.* Cologan, 4 Taunt. 329, the policy was void on account of an alteration made by the assured subsequent to the signing. Held, that the premium need not be returned.

In Waters *v.* Allen, 5 Hill, 421, the risk was divisible, and, during the first part, the policy was avoided by the fraudulent destruction of the vessel by the agents of the assured. It was held, that the premium was, nevertheless, returnable for the other part of the risk, on the ground that it was not necessary for the assured to set up his own fraud, but only the fact that there was no commencement of that part of the risk.

Mr. Phillips seems to be of the opinion, on the authority of a case stated by Mr. Ellis, Duckett *v.* Williams, Ellis on F. & L. Ins. 142, that where a policy is void in consequence of the fraudulent misrepresentation of an agent without the knowledge of his principal, the latter may recover the premium. 2 Phillips, Ins. § 1845. But the true rule, deducible from the case cited, seems to us to be that where A. has an interest in the life or property of B. and causes it to be insured, although the policy may be avoided by the fraudulent representations of B., still A. can recover back the premium.

[3] See ante, p. 183, n. 3 and 4, as to the payment of premium in England. In Hem-

[4] Felton *v.* Brooks, 4 Cush. 203; Castelli *v.* Boddington, 1 Ellis & B. 66, 16 Eng. L. & Eq. 127.

menway *v.* Bradford, 14 Mass. 121, a promissory note had been given for the premium, which still remained unpaid, and had never been negotiated. *Per Curiam.* "It has been repeatedly decided, in this court, that when the assured is entitled to a return of premium, he may recover the amount in an action for money had and received; although his note given for the premium should not have been paid. The underwriter, by the terms of the policy, expressly acknowledges the receipt of the premium; and whether it was paid to him in cash, or in merchandise, or by a negotiable note, or in any other manner, the action to recover it back will still be in the same form." The giving of a promissory note is, in Massachusetts, *primâ facie* payment. This view of the nature of a promissory note may have influenced this decision, so as to affect its weight as an authority in other courts.

CHAPTER VI.

OF THE DESCRIPTION OF THE PROPERTY INSURED.

THE property insured should be set forth in the policy, or the means of further description referred to, in such a way that the subject-matter of the insurance can be distinctly identified. This seems to be the only general rule on the subject; but there are many subordinate and subsidiary rules. And usually, much latitude of construction is allowed in applying the terms used in a policy to the interest of the assured. For if the assured has concealed any fact respecting his interest which it is material for the insurer to know, the latter can set up the concealment as a defence. If there has been no concealment, it seems unjust that the assured should suffer, even if only a liberal construction can bring his interest within the terms of the policy. This seems to be a reason for construing policies of insurance, in favor of the assured, with greater liberality than other contracts; and such, to some extent, appears to have been the policy and practice of some courts.

If the description be, on the whole, sufficient for identification, a mere mistake in a name or other part of it will not avoid the policy.[1]

[1] In Ruan *v.* Gardner, 1 Wash. C. C. 145, the agent of the insured, by mistake, described the goods as marked (D), on board the Brothers. The goods were on board the vessel named, but not marked as described. Mr. Justice *Washington* said: "It was perfectly immaterial to the risk what were the marks on the hogsheads, provided the risk undertaken by the underwriters was neither changed nor increased. Nor was this the case since it is in proof that the plaintiff shipped but five hogsheads on board the Brothers. If, indeed, he had had more, some marked D, and others with other marks, and a partial loss had happened, it would not have been competent to the plaintiff to shift from one mark to another so as to alter the risk and possibly make the underwriters liable for hogsheads not insured. But this was not, and could not, be the case in the present instance."

In the common form of policies there is usually added to the name given to the ship the clause, "or by whatsoever other name or names the said vessel shall be named or

The subject-matter may be described by the port of shipment,[1] or by the voyage, or by the consignee,[2] or by the time of shipment. If a vessel in the trade and belonging to the assured, or having cargo so belonging, answers accurately to the whole description, and another which answers to it also but only imperfectly, cannot be substituted for the first by evidence of intention.[4] But where different shipments come within the description in the policy, there it seems to be the rule that the insured may attach it to any of them by his declaration,[5] and he may so

called." It was once contended that this meant other names in addition to the one given in the policy, and hence that under a policy insuring the Leopard, there could be no recovery for the loss of a ship called the Leonard. But the court held otherwise, saying that under this clause it was only necessary to prove the identity of the ship. Hall v. Mediterranean, cited 4 East, 566. So a vessel called the President may be shown to be the one described as called "the American ship President." Le Mesurier v. Vaughan, 4 East, 582. And the "Tres Hermanas," to be the "Three Sisters." Clapham v. Corrigan, 1 Camp. 382. In Sea Ins. Co. v. Fowler, 21 Wend. 600, there was an insurance on goods taken on board the brig Aleoma. There were two vessels in the trade of the same name, one a brig and the other a schooner or half brig. The goods were taken on board the latter. Held, that the burden was on the plaintiff to prove that, although the brig was mentioned, the schooner was the one meant. Emerigon, ch. xi. s. ii., Meredith's ed., 127, says: "All our authors agree that we must not refine too much on this point of the name of the ship, provided the error which has taken place does not prevent us from recognizing its identity."

[1] In Murray v. Col. Ins. Co., 11 Johns. 302, the insurance was on all kinds of goods and merchandises, "from and immediately following the loading on board the said vessel at *Cagliari*." The only cargo shipped at Cagliari, was a quantity of salt, although the whole outward cargo was there taken out and reshipped; it was held, that the description only applied to the salt, and that that alone was covered by the policy. See also, Rickman v. Carstairs, 5 B. & Ad. 651; Hunter v. Leathley, 10 B. & C. 858, 7 Bing. 517; Grant v. Paxton, 1 Taunt. 463.

It was before stated that words used in describing the subject of insurance are regarded as warranting that the subject shall be what it is described. Hence this subject of description is very intimately connected with that of express warranties.

[2] Ballard v. Merchants' Ins. Co., 9 La. 258.

[3] In Scribe v. Merch. Ins. Co., 6 La. 185, "the contract was made to insure goods to be shipped from Havre, or any port south of it in France, and to be consigned to the insured, during a period of six months, to commence from the first of August, 1832." Some of the goods were on board before that time, but the vessel did not sail until after it. Held, that the goods loaded before the first of August were covered.

[4] Sea Ins. Co. v. Fowler, 21 Wend. 600.

[5] Henchman v. Offley, 2 H. Bl. 345, n.; Kewley v. Ryan, 2 H. Bl. 343. In this last case the insurance was "at and from Grenada to Liverpool on any kind of goods as interest should appear, in ship or ships on account of F. & R." There were two cargoes to which the policy would apply. The assured, in his letter directing insurance, had expressed an intention to apply the policy in question to the cargo which was lost, but this intention was unknown to the underwriter. The court said, "that

attach it by a *bonâ fide* declaration or designation made after the loss has occurred, if such appears to have been the intention of the parties.[1] But this rule should not extend so far as to cause a dangerous facility of fraud; and, therefore, the policy will be held to cover all the shipments of the insured which have been at risk, and come clearly within the terms of the policy, unless the insured has confined the policy to some part, or shown his purpose of doing so, by some act or designation made before the loss.[2] And if the policy be in the alternative, the insured may apply it to either of the alternatives, in which he is interested, unless he is interested in both; in that case, — as if the expression were "ship or cargo," and both have been at risk, — the policy must attach ratably to both.[3]

the assured had clearly a right to apply such an insurance to whatever ship he thought proper, within the terms of it, for which the case of Henchman *v.* Offley was an authority." It seems that policies of this nature were not novel in practice, at the time of the case of Da Costa *v.* Firth, 4 Burr. 1966, (A. D. 1766), although that was the first case of the kind in Westminster Hall.

[1] Harman *v.* Kingston, 3 Camp. 150. The insurance was "on sugar and cotton, as might be thereafter declared and valued." No declaration of interest or valuation was made before the loss. Lord *Ellenborough* held, that the insured might recover as on an open policy, the interest being a matter of evidence at the trial. See also, Craufurd *v.* Hunter, 8 T. R. 13, 16, note a.

In Edwards *v.* St. Louis Perpetual Ins. Co., 7 Mo. 382, the insurance was "from St. Louis to port or ports, etc., indorsements on this policy to be evidence of property at the risk of the company under the same." The assured received no invoice or description of the goods before intelligence of the loss, but offered to indorse as soon as the description of the goods was ascertained. It was held, that the indorsement should have been made before the loss, and the case was distinguished from Harman *v.* Kingston, by reason of the different forms of expression in the two policies. See also, Douville *v.* Sun Mutual Ins. Co. of N. Y., 12 La. Ann. 259, cited ante, p. 35, n. 4. But in E. Carver Co. *v.* Manuf. Ins. Co., 6 Gray, 214, where the policy stated that all sums placed at risk under the policy were to be indorsed thereon, the court held that if before the loss the insured intended to cover a certain shipment, they might declare it after the loss took place, if there was no want of reasonable diligence on their part. It was also held, that after an abandonment and a suit brought on the policy, the claim was not waived by an indorsement of other risks, which would almost exhaust the policy and the receiving back, by the assured, of the premium for the balance.

[2] See N. Y. Fire Mar. Ins. Co. *v.* Roberts, 4 Duer, 141.

[3] In Faris *v.* Newburyport Mar. Ins. Co., 3 Mass. 476, the insurance was on the cargo or freight of the ship America, both or either to the amount insured valued at the same sum. The assured was interested both in the cargo and freight, and both were lost, but as he had recovered on a prior policy for the loss of the cargo, he contended that he could apply this policy to the freight alone. *Sewall*, J., said: "To construe this insurance, at the election of the assured after the event, to be of the freight only,

Merchandise, or any equivalent word, as goods, or wares, does not apply to ornaments, or clothing, or other similar articles, if they are owned by persons on board, and are not intended in any way for sale.[1] "Cargo" means much the same thing as merchandise.[2] "Property" is much more comprehen-

exclusive of the cargo, would establish a very unequal contract between these parties. This construction, for which the plaintiffs contend, is inadmissible, unless it appeared to be the unavoidable import of the words of the contract; which is far from being the case in this instance. The alternative in the original policy, especially connecting with the words *freight* or *cargo*, the words *or either to the amount insured*, which are separated by the description of the voyage, and have no meaning but in the proposed connection, more naturally imports an insurance of freight or cargo as interest shall appear. In this view of it, the contract may be explained; an insurance of freight or of cargo, in the event the insured should have only one of those descriptions of property at risk in the voyage insured; and if he should have both descriptions at risk, then it is an insurance upon both proportionably to the interest of the insured."

[1] Ross *v.* Thwaite, Park, Ins. 25.

[2] In Da Costa *v.* Firth, 4 Burr. 1966, the words "goods and merchandise," and in Wolcott *v.* Eagle Ins. Co., 4 Pick. 429, the word "cargo" was held to apply to bullion on board unless it was intended for the expenses of the master, crew, or passengers. Under many foreign ordinances bullion would not be covered under the general term goods. See 1 Magens, 10. The description "goods and merchandise" will cover specie dollars. Am. Ins. Co. *v.* Griswold, 14 Wend. 399. See also, Seton *v.* Del. Ins. Co., 2 Wash. C. C. 175, 178, per *Washington*, J. In Thomas *v.* Royal Exch. Ass. Co., *Dampier*, J., ruled at *Nisi Prius*, that an insurance on goods and merchandise would cover dollars if entered at the custom-house, but not bank-notes. Manning's Dig. 164, Ed. of 1820. No exceptions seem to have been taken to this ruling, as the case on appeal does not mention this point. 1 Price, 195. It was also held in Wolcott *v.* Eagle Ins. Co., that the word cargo would not cover live-stock on board. Weskett, 260, tit. Goods, was cited where the general principle is laid down that "Every person making insurance under the general expression of goods, ought not to conceal any thing he may know to deserve a greater premium than is commonly given." Live-stock is generally insured *eo nomine*. See Lawrence *v.* Aberdein, 5 B. & Ald. 107; Coit *v.* Smith, 3 Johns. Cas. 16. But it seems that if live-stock is the usual or principal export from a place, the word cargo would include it without further description. Allegre *v.* Maryland Ins. Co., 2 Gill & J. 136; Chesapeake Ins. Co. *v.* Allegre, 2 Gill & J. 164. In Hill *v.* Patten, 8 East, 373, Lord *Ellenborough*, C. J., seemed inclined to hold that the word cargo in a policy on a whaling voyage would only apply to the homeward-bound cargo, consisting of the immediate produce and result of the fishing adventure. But in Paddock *v.* Franklin Ins. Co., 11 Pick. 227, *Shaw*, C. J., was inclined to think that it would apply to the outfits, though he gave no opinion on the subject, holding that it would protect "oil and other articles which are the ordinary products of the voyage from the time the vessel first began to take whales." The application of the word in such a case would probably be determined by usage. In Rogers *v.* Mechanics Ins. Co., 1 Story, 603, the word "catchings" in a policy on a whaling voyage was held to cover blubber or pieces of whale flesh, cut from the whale and on deck.

In Hill *v.* Patten, 8 East, 373, Lord *Ellenborough*, C. J., said: "Outfit in a fishing

sive; and indeed it would be difficult to limit the meaning of this word.[1] In most cases the meaning of the terms used is strongly affected, if not determined, by the usage of the place where the contract was made.[2]

When the identification rests materially on the time of shipment, the phrase "between two certain days," excludes both of them.[3] The term "all lawful goods" includes all not unlawful by the laws of the country where the policy is made, whether they are or are not liable to seizure, as contraband or otherwise prohibited abroad.[4]

Policies are often made on an outward bound cargo, and "the return cargo," or "the proceeds" or "returns." This is intended generally to cover a homeward cargo, bought by the outward; but the first phrase may apply to the homeward cargo, if owned by the insured, however it was purchased; and the other phrases may apply to goods shipped on the return voyage, on the credit of an outward cargo which has been pledged or assigned to be sold and pay for them.[5] But neither of these phrases, will cover

voyage, principally consists in the apparatus and instruments necessary for the taking of fish, seals, etc., and the disposing of them, when taken, in such a manner as to bring home the oil, blubber, bone, skins, and other animal produce of the adventure, with the greatest convenience and advantage."

In Pritchet *v.* Ins. Co. of N. A., 3 Yeates, 458, it was found by the jury to be the usage of Philadelphia to include profits under the word "goods." In Hunter *v.* Prinsep, Marsh, Ins. 316, it was held that the term "piece goods" would not apply to hats. In Duplanty *v.* Commercial Ins. Co., Anthon, N. P. 114, a curricle was held to come under the description, "goods, wares, and merchandise."

In Palmer *v.* Pratt, 2 Bing. 185, papers purporting to be bills of exchange, payable in thirty days after the arrival of the vessel, were described as "bills of exchange." It was held, that, as a bill payable on a contingency was void, the papers were worthless, and the insurable interest, if there was any, improperly described.

[1] In Whiton *v.* Old Colony Ins. Co., 2 Met. 1, the word "property" was held to cover current bank-bills carried for the purposes of trade. *Shaw*, C. J., said: "But whatever the construction of a policy may be when the insurance is upon 'goods, wares, and merchandise,' we think there can be no doubt, that under the larger term 'property,' money carried for the purchase of cargo, or received for the sale of cargo would be included." This term also covers the commissions of the master. Holbrook *v.* Brown, 2 Mass. 280. See also, Wiggin *v.* Mercantile Ins. Co., 7 Pick. 271.

[2] See ante, p. 58, n. 1.

[3] Atkins *v.* Boylston F. & M. Ins. Co., 5 Met. 439.

[4] See ante, p. 170, n. 1.

[5] Haven *v.* Gray, 12 Mass. 71; Whitney *v.* Am. Ins. Co., 3 Cow. 210, 5 Cow. 712. In this latter case the insurance was on the outward cargo and the returns home, valued at $14,000. The outward cargo was pledged to its full value, $7,000, and

the same goods brought home again, unless they are aided in this application by evidence of usage.[1]

In general, whenever the policy indicates in any way that the subject-matter is to be changed in the course of the voyage, or the period for which insurance is effected, such change may be made and the policy continue to attach.[2]

It seems to be settled (as may be inferred from what has been already said on the subject of representation and concealment) that the interest of the insured need not, in general, be specified; as whether it be one half, or one third, of the property. So, a charterer, assignee, mortgagee, whether legal or equitable, mortgagor, trustee, consignee, carrier, may all of them insure their property or interest generally, without stating what it is; and generally any right to a percentage or share by way of commissions or compensation may be so insured, and

goods were purchased therewith. The court held that if the outward cargo had been sold for $7,000, and the return cargo purchased with the proceeds, the insured could have recovered to the amount of $14,000, and the same rule applied where the property was pledged to that amount.

[1] Dow *v.* Hope Ins. Co., 1 Hall, 166; Dow *v.* Whetten, 8 Wend. 160. In this case the captain, on arrival at the outward port of destination, finding no market for the goods, brought them home again. They were damaged on the homeward voyage, and the owner claimed to recover on the ground that the term "proceeds" would cover the same goods if brought home. The Superior Court of New York City decided in favor of the defendants. An appeal was taken to the Supreme Court, and the plaintiff nonsuited. It then came up before the Court of Errors (8 Wend. 160), and the judgment of the Supreme Court was reversed solely on the ground that evidence was rejected tending to show a usage that the term "proceeds" was meant to cover the same goods if brought back.

[2] In Coggeshall *v.* Am. Ins. Co., 3 Wend. 283, the policy was on goods, "to commence from and immediately following the loading of the goods on board of the vessel." It was a time policy. It was held that goods substituted for those first placed on board were covered. See also, Grant *v.* Paxton, 1 Taunt. 463; Grant *v.* Delacour, id. 465.

In Crowley *v.* Cohen, 3 B. & Ad. 478, the policy was on goods and boats containing the goods, at work on the canal between London, Wolverhampton, Birmingham, etc., "backwards and forward, and in any rotation," beginning the adventure upon the goods from the loading thereof on board, and continuing it till the same should be discharged and safely landed, with leave to discharge goods at all regular places on the line. The insurance was for £12,000; £3,000 only to be covered in any one boat on any one trip. It was contended that as soon as goods to the value of £12,000 had been carried by each boat the policy was exhausted. It was held that, the intention clearly was, that £12,000 should be insured upon each successive number of cargoes; and therefore, that the whole value of the goods afloat at the time of the loss, compared with £12,000, would afford the true measure of the defendant's liability.

need not be specified. But an open policy on a ship, or goods, or freight, as such, cannot apply to profits;[1] although the policy on goods is often made by means of a valuation to cover profits in fact.[2]

Insurance on the ship covers all that belongs to it, as, hull, sails, rigging, tackle, apparel, or furniture;[3] and under this latter title provisions have been included.[4] But the "outfits of a whaling voyage are held not to be covered by a policy on the ship."[5]

Such things as anchors, boats,[6] charts, compasses, quadrants

[1] Lucena *v.* Craufurd, 5 B. & P. 269, 315. In Wright *v.* Pole, 1 A. & E. 621, insurance was effected by the proprietor of an inn on his interest in the inn and offices. Held that this would not cover a loss of profits while the inn was being repaired, and *Taunton*, J., said: "I never heard before of a recovery of profits of a business as an incidental part of the loss, under an insurance upon a house or ship." So as to a theatre. Niblo *v.* North American Fire Ins. Co., 1 Sandf. 551. See Pritchet *v.* Ins. Co. of N. A., 3 Yeates, 458, 461, ante, p. 201, note.

[2] See ante, p. 70, notes 1–4.

[3] In Mason *v.* Franklin F. Ins. Co., 12 Gill & J. 468, it was held that an insurance "on a new bark now being built," covered only the vessel in process of construction, and not articles made for her, delivered in the ship-yard where she was being built, and intended to be attached to her as soon as she was ready to receive them. And in New York this principle has been carried to a still greater extent. Insurance was made "on a bark on the stocks building," etc. It was held that this did not cover timbers not united to the structure, although they were intended and completely prepared to be used in its frame-work, in the proper place for that use, and valueless for any other vessel. Hood *v.* Manhattan F. Ins. Co., 1 Kern. 532, overruling the same case in the Superior Court, 2 Duer, 191. And the same principle has been applied to a house. Ellmaker *v.* Franklin F. Ins. Co., 5 Barr, 183. See also, Vol. I. p. 72, note.

[4] Provisions on board for the use of the crew were held to be covered by a policy on the ship and furniture, in Brough *v.* Whitmore, 4 T. R. 206, and the remark of Lord *Mansfield*, C. J., in Robertson *v.* Ewer, 1 T. R. 127, that "on a policy on a ship sailor's wages or provisions are never allowed in settling the damages," was said to refer not to the provisions taken on board as a part of the outfit, but to those purchased or used in a port where the vessel was detained. Emerigon, ch. 10, s. 1, § 2, Meredith's Ed. 234, says: "The expression *on the body* embraces in its generality, as I have just said, all that regards the ship. Such are the hull of the vessel, its rigging and apparel, munitions of war, stores, and victualling, advances to the crew, and all that has been expended in the fitting it out."

[5] Hoskins *v.* Pickersgill, 3 Doug. 222; Gale *v.* Laurie, 5 B. & C. 156, 164. See Hill *v.* Patten, 8 East, 373.

[6] Hoskins *v.* Pickersgill, 3 Doug. 222; Hall *v.* Ocean Ins. Co., 21 Pick. 472. In Blackett *v.* Royal Exch. Ass. Co., 2 Cromp. & J. 244, 2 Tyrw. 266, the boat was specifically insured, and the only question was whether parol evidence of a usage was admissible to show that underwriters never paid for boats on the outside of the ship

or sextants, chronometers, or the like, owned by the owner of the ship, and properly requisite and used for her safe navigation,[1] are insured under the word "ship." And whatever alteration or addition the vessel may undergo while so covered, by repairs, properly so called, she will still be within the insurance.[2]

Freight is often insured in fact by a valuation of the ship; but an open policy on the ship does not include freight. If the insurance be on freight, *eo nomine*, and the insurance be for a specified period, or for successive voyages, the policy will in general attach to whatever freight may be actually on board at successive periods within the terms and scope of the policy.[3]

One who owns both ship and cargo may cover, by the word "freight," his interest in the transportation of his cargo to its destined market.[4] Freight "to" a place may be valid, although the cargo is destined to a subsequent port where alone the freight is payable; on the ground that this is but an insurance of the freight for a part of the way.[5] But freight "at and from" cannot cover freight "to" the same port.[6]

slung on the quarter. The court held it was not. But evidence would be admissible, in such a case, to show that the boat was improperly carried, if at the stern or on the quarter, but the burden of proof would be on the underwriters. Hall *v.* Ocean Ins. Co., *supra*. See vol. 1, p. 72, note.

[1] Such is the practice in Boston, 1 Phillips, Ins. § 468. But if it could be shown to be the practice for the master of the vessel to furnish these things on his own account, it might be questioned whether they would be covered by an insurance on the ship, unless a usage to that effect could be shown.

[2] Le Cheminant *v.* Pearson, 4 Taunt. 367. See Livie *v.* Janson, 12 East, 648, and cases ante, vol. 1, p. 72, and note 1, p. 73.

[3] The great difficulty in applying the policy to successive voyages has arisen in the case of valued policies. It has been held, that whether the valuation of freight in such cases, is to be applied to the freight at risk on each voyage, depends upon the intention of the parties. See ante, p. 69, n. 2.

[4] In Dumas *v.* Jones, 4 Mass. 647, the court differed in opinion on this question, but it seems now to be settled. See cases cited post, p. 205, n. 4. When a loss happens in such a case the owner can recover only the usual and reasonable rate of freight for the voyage at the port of departure, and not the profits he might have made. Paradise *v.* Sun Mut. Ins. Co., 6 La. Ann. 596.

[5] In Taylor *v.* Wilson, 15 East, 324, the voyage was from St. Ubes to Gottenburgh, by way of Portsmouth. The insurance was effected on freight from St. Ubes to Portsmouth, and the destination to Gottenburgh was not disclosed to the underwriters. The vessel was lost before her arrival at Portsmouth. It was held, that the freight to Portsmouth could be recovered, overruling a *nisi prius* decision of Lord *Kenyon*, C. J., to the contrary, in Murdock *v.* Potts, Park. 399.

[6] Bell *v.* Bell, 2 Camp. 475. The policy was on freight "at and from Riga," and

If freight be insured from one port to another, and the insured has leave to take in goods at intermediate ports, the freight on these goods is covered.[1] If the statement or description of the goods, or the notice to the insurer, be such that a policy would not have attached had it been made on goods, a policy on freight will not in general attach to the freight of these goods.[2]

An assignee of freight for a valuable consideration, who has an interest subsisting at the date of the policy, which continues to the time of the loss, may insure it as freight.[3] And the word "freight" means equally the profit derived by the owner of a ship from carrying his own goods,[4] or the amount to be paid to the owner by a shipper whose goods he carries, or by a hirer of a ship, for its use,[5] or the profits of a hirer as *quasi* owner, from carrying his own goods, or the amount to be paid him for carriage by others.[6] Under some circumstances, as we have seen in our first volume,[7] the shipper of goods cannot, if he pays the freight in advance, recover it back on the ground that the voyage has not been performed. In such a case he may insure the freight *eo nomine*, and it has been held, that the underwriters cannot avoid their liability on the ground that the freight might have been recovered back on the occurrence of a loss.[8]

the policy was declared to be *in continuation of other policies* to Riga. The vessel was seized at Riga before the discharge of the outward cargo, but after the policy on the voyage to Riga had ceased to operate. It was urged that the policy, being in continuation of the previous ones, should cover the freight on the cargo to Riga. The court held otherwise.

[1] Barclay *v.* Stirling, 5 M. & S. 6.

[2] In Adams *v.* Warren Ins. Co., 22 Pick. 163, the insurance was on freight generally. It was held, that it did not cover the freight of goods carried on deck. See also, Wolcott *v.* Eagle Ins. Co., 4 Pick. 429.

[3] Paradise *v.* Sun Mut. Ins. Co., 6 La. Ann. 596.

[4] Flint *v.* Flemyng, 1 B. & Ad. 45; Devaux *v.* J'Anson, 5 Bing. N. C. 519; Forbes *v.* Aspinall, 13 East, 323; Wolcott *v.* Eagle Ins. Co., 4 Pick. 429; Adams *v.* Pennsylvania Ins. Co., 1 Rawle, 97; Hart *v.* Delaware Ins. Co., 2 Wash. C. C. 346. See also, Allen *v.* Mackay, U. S. D. C., Mass., 16 Law Reporter, 686.

[5] Flint *v.* Flemyng, 1 B. & Ad. 45; Truscott *v.* Christie, 2 Brod. & B. 320; Moses *v.* Pratt, 4 Camp. 297; Thompson *v.* Taylor, 6 T. R. 478; Horncastle *v.* Suart, 7 East, 400; Robinson *v.* Manufacturers' Ins. Co., 1 Met. 143. See Simmes *v.* Mar. Ins. Co., 2 Cranch, C. C. 618.

[6] Clark *v.* Ocean Ins. Co., 16 Pick. 289.

[7] See ante, vol. 1, p. 223.

[8] Kathman *v.* General Mut. Ins. Co., 12 La. Ann. 35. It was also held, in this case,

If the charterer is to pay for the hire of the vessel only on her safe arrival at the port of destination, the owner may insure the amount of the charter-money as freight, but the charterer cannot, because, if the vessel is lost, he pays nothing and so loses nothing,[1] but it is said, that if a charterer has received goods on board from another party, who has engaged to pay him more than he is to pay for the hire of the vessel, he may now insure his interest in the freight.[2]

The questions which have arisen on this subject are certainly difficult, and the authorities have been thought to be irreconcilable. We think that principles may be found, which will suffice to guide one through this apparent confusion. These cases are considered in our note.[3]

that unless the answer specially denies the fact that freight was paid in advance, the fact need not be proved.

[1] Robbins *v.* New York Ins. Co., 1 Hall, 325; Mellen *v.* National Ins. Co., 1 Hall, 452.

[2] Clark *v.* Ocean Ins. Co., 16 Pick. 289.

[3] Mr. Phillips (1 Ins. § 480) considers some of the decisions upon the application of the term freight, in cases where there have been charter-parties, irreconcilable. But it seems to us, after a careful consideration of them, that they may be reconciled with each other and with principle. It must be kept in mind that freight must belong either to the absolute owner or to the owner *pro hac vice*. See opinion of *Putnam*, J., in Clark *v.* Ocean Ins. Co., 16 Pick. 289. It has been universally admitted that the owner may insure, under the term freight, either what is to be paid him directly for the carriage of goods, or what is to be paid by a charterer. The difficulty is supposed to arise, when a charterer insures freight, in determining whether the term is to be applied, either to what he is to receive for carrying the goods of others, or to the increased value, which he expects will accrue from the carriage of his own goods.

That it will apply to the former, provided the charterer has any interest at risk, is virtually decided in the case of Clark *v.* Ocean Ins. Co.; for it is obvious that if the term freight will apply to that part of the amount to be so received by which it exceeds the amount to be paid under the charter, it will apply to the whole. The case of Riley *v.* Delafield, 7 Johns. 522, does not appear to us to conflict with this doctrine. In that case the plaintiff had owned the vessel and had chartered her to K. He then sold the vessel to H., and it was agreed that the plaintiff should have the whole benefit of the freight for the voyage upon which she was chartered. The plaintiff then insured "on the freight" for that voyage, without making any disclosures as to the nature of his interest. It was held, that there could be no recovery. 1. Because "all the interest of the plaintiff was founded upon this special agreement, and it could not strictly or technically be denominated freight, since it was not an interest accruing to the plaintiff, as owner of the vessel for the use of her." 2. Because there was a material concealment. The first reason seems to be a sound one, for the plaintiff was not charterer, as the vessel was chartered to K., nor was he the general owner, nor in any sense could he be considered the owner *pro hac vice*, and the case, therefore, does not seem to conflict

If a party has a lien on freight by advancing money upon it, he can insure his interest under the name of freight.[1]

There is a rule resting on public policy and expediency, that goods carried on deck, are not covered by a general policy on cargo, or property, or goods.[2] But there prevails also an exceptional usage in some ports, to carry any goods on deck on certain voyages or passages; and in others, to carry particular goods in this way, on certain voyages. The cases are quite numerous on this subject, and present some anomalies. But whatever the usage may be, if it be distinctly established, and

with the decision in Clark *v.* Ocean Ins. Co., or with the doctrine which we have supposed necessarily to follow from it. We find no other case which seems to conflict with it. In Mellen *v.* National Ins. Co., 1 Hall, 452, 463, the plaintiff, on the arrival of the vessel, was to receive a certain amount for carrying goods and to pay an equal or greater amount as charterer. Of course he would lose nothing if she did not arrive, and hence the court held, that he had no insurable interest.

We think it clear, therefore, on principle and authority, that a charterer may insure under the name of freight what he is to receive for carrying the goods of others, provided that amount is at his risk.

Another question is, whether a charterer can recover the increased value which accrues from the carriage of his own goods under the name of freight. From the cases cited ante, p. 205, n. 4, it appears that a general owner may recover this under the name of freight, and it would seem at first to follow that a charterer, or owner *pro hac vice*, could do the same. But it has been held otherwise, on the ground that the amount paid under the charter-party is to be considered the freight. Cheriot *v.* Barker, 2 Johns. 346; Mellen *v.* National Ins. Co., 1 Hall, 452, 463.

[1] Robbins *v.* New York Ins. Co., 1 Hall, 325; Hall *v.* Janson, 4 Ellis & B. 500, 29 Eng. L. & Eq. 111. See also, Winter *v.* Haldimand, 2 B. & Ad. 649. In Sansom *v.* Ball, 4 Dall. 459, the plaintiff insured, under the term "freight advanced," a sum of money paid for the privilege of filling a part of the vessel. Evidence of usage was introduced to show that that term was applied to the amount paid in that manner.

[2] Wolcott *v.* Eagle Ins. Co., 4 Pick. 429; Adams *v.* Warren Ins. Co., 22 Pick. 163; Taunton Copper Co. *v.* Merchants' Ins. Co., 22 Pick. 108; Milward *v.* Hibbert, 3 Q. B. 120. In Taunton Copper Co. *v.* Merchants' Ins. Co., *Putnam*, J., said: "The general rule unquestionably is, that a policy on goods or merchandise or property in general terms, on board a ship, does not extend to goods, property, or merchandise laden on deck." In both of the above cases the question was very elaborately discussed, and many foreign authorities were cited and commented upon. See the following note, and Ross *v.* Thwaite, Park, Ins. 25; Backhouse *v.* Ripley, id. 25; Lenox *v.* U. S. Ins. Co., 3 Johns. Cas. 178; Allegre *v.* Maryland Ins. Co., 2 Gill & J. 136. And the underwriters are not liable for a neglect to specify the cargo as being on deck, although a bill of lading stating the fact was handed to the secretary of the company, before the policy was issued, but which he did not open or read. Smith *v.* Miss. Mar. & F. Ins. Co., 11 La. 142. In Brooks *v.* Oriental Ins. Co., 7 Pick. 259, 269, insurance on a vessel and her appurtenances, was held not to cover a hawser stowed in a boat upon deck, when it should have been in the hold.

known, actually or constructively to the insurer, we think it must countervail the general rule, and an insurance either on goods generally, or on freight generally, would apply to such goods in the same way as if they were carried in the hold.[1] And it has

[1] In Milward *v.* Hibbert, 3 Q. B. 120, the precise question raised upon demurrer was, whether, in any case whatever, the ship-owner can recover of the underwriter the value of goods loaded on deck. After very elaborate arguments by Mr. Cresswell on one side and Sir W. W. Follett on the other, and a most thorough consideration of the authorities, both English and continental, by the court, it was held, "that the mere fact of stowing goods on deck will not relieve the underwriters from responsibility, inasmuch as they may be placed there according to the usage of the trade, and so as not to impede the navigation, or in any way increase the risk."

In Da Costa *v.* Edmunds, 4 Camp. 142, the court seemed to regard the question as one of concealment, and implied that if the fact that goods were to be carried on deck were communicated, the policy would cover them. Under this view the only effect of a usage would be to obviate the necessity of making any representation, and it would not strictly be applied to affect the construction of the language of the policy. There are also *dicta* in the case of the Taunton Copper Co. *v.* Merchants' Ins. Co., 22 Pick. 108, which point in the same direction. *Putnam*, J., said: "And we certainly agree, that if underwriters are informed of the kind of property, and such property is usually carried on deck for its own safety, particularly, as well as for the safety of the ship and the whole concern, they are to be answerable in the same manner as if they were expressly told that the property was to be carried on the deck of the ship." This certainly implies that a communication of the fact that the goods were to be carried on deck would bring them within the contract, although there were no express agreement to that effect in the policy. But the obvious effect of this view of the case would be to avoid the policy *in toto* for concealment, if the carrying of the goods on deck is not communicated, whereas, if the doctrine applied to these cases is, that general terms in a policy will not ordinarily cover goods placed on deck, the policy remains valid as to goods not carried on deck, while those which are so carried are excluded from it. The latter view appears to be the one taken in Milward *v.* Hibbert, *supra*, and in the decision of Taunton Copper Co. *v.* Merchants' Ins. Co., *supra*, and the nature of the usage required in the latter case is in conformity with that view. If the question were merely, whether the assured should have communicated the fact that the goods were to be carried on deck, it would seem to be sufficient to show a usage to carry goods in that manner frequently, for this would put the underwriters upon inquiry, and that is sufficient to discharge the assured from the obligation to make representations, and it would not be necessary to show a usage of the underwriters to pay in such cases. But if it is incumbent on the assured to show that terms, which ordinarily do not apply to goods on deck, are on the ground of usage to be applied to them in any particular case, it follows that a usage *so to apply those terms* must be shown. It is not enough to show that goods are sometimes or often so carried on a particular voyage, the very statement of the rule that goods so carried are to be excepted, implies that it is well known that they are so carried. Merely increasing the number of exceptions does not change the rule, but a usage must be shown to dispense with the rule. Taunton Copper Co. *v.* Merchants' Ins. Co., 22 Pick. 108; Smith *v.* Miss. F. & M. Ins. Co., 11 La. 142. If it could be shown that the goods insured were usually carried on deck, the very fact of insuring such goods would show an agreement to dispense with the rule.

been held, where the "catchings" in a whaling voyage were insured, and it was proved that the word included blubber which was usually carried on deck, that the underwriters were liable.[1]

So it has been held, that the rule does not apply to goods which can, with equal or greater safety to themselves and the cargo generally, be carried on deck. Taunton Copper Co. *v.* Merchants' Ins. Co.; Da Costa *v.* Edmunds.

But the fact that there has been a usage to stow goods, not liable to injury from dampness on deck, if there is a suitable cargo in the hold, was held not to be sufficient to charge the underwriters. Taunton Copper Co. *v.* Merchants' Ins. Co. *Putnam*, J., said: "The usage stops *in limine*, or at most, is only one step in the journey. The general rule of law which we have considered, supposes that goods are carried on deck. The usage does not find that underwriters have, in a single instance, ever paid a loss upon goods carried on deck, unless there has been a special contract or unless from the nature of the property the underwriters were by law to be presumed to have undertaken that particular risk." We cannot see, however, any good reason for requiring that a usage for the insurers to pay, should be required, if the usage of carrying certain goods on a certain voyage be established, and the insurers insured those goods for that voyage with a knowledge of that usage and without objecting to it.

[1] Rogers *v.* Mechanics' Ins. Co., 1 Story, 603.

CHAPTER VII.

OF THE RISKS WHICH ARE COVERED BY THE POLICY.

SECTION I.

OF THE GENERAL RESPONSIBILITY OF INSURERS.

THE insured is never to be indemnified against his own act; nor against loss directly caused by his own personal misconduct.[1] And this principle has been carried so far as to discharge

[1] Emerigon, ch. xii., s. 11, § 1, Meredith's Ed. 290, says: "It is then certain that the insurers never answer for damages and losses which happen directly through the act or fault of the assured himself. It would be, in fact, intolerable that the assured should be indemnified by others for a loss of which he is the author. This rule is grounded upon first principles. It is delivered in the Law *cùm proponas*. It is applied to the contract of insurance by the Guidon, and is repeated in all our books. *Si casus evenit culpâ assecurati, non tenentur, assecuratores.* It is a general rule, from which it is not permitted to derogate by a contrary agreement: *Nulla pactione effici potest ne dolus praestetur.* As Pothier remarks: 'It is evident that I cannot validly agree with any one that he shall charge himself with the faults that I shall commit.'" The principle of the common law appears to be the same. See Skidmore *v.* Desdoity, 2 Johns. Cas. 77; Goix *v.* Knox, 1 Johns. Cas. 337; Chandler *v.* Worcester Mut. F. Ins. Co., 3 Cush. 328. But if the policy excepts loss by the design of the insured, the underwriters will be liable for loss occasioned by his negligence, unless it be so great as to amount to fraud. Catlin *v.* Springfield F. Ins. Co., 1 Sumner, 434. In the case of Amicable Society *v.* Bolland, 2 Dow & C. 1, a case of life insurance, it was held that the insurers were not liable where the assured was executed for felony. And the court said that the law would be the same if the insurance had been specifically against a felonious death. This question was much considered in the recent case of Thompson *v.* Hopper, 6 Ellis & B. 937, 38 Eng. L. & Eq. 39. It is settled, as we have already seen, that in England there is no implied warranty in a time policy. The vessel was sent to sea by her owners in an unseaworthy condition, they knowing the fact. Soon after sailing, it was found to be impossible to proceed owing to her condition, and she was brought up in an open roadstead, and while there by an acci-

the insurers, where a total loss could be attributed to the owner's neglect in not furnishing funds.[1] But when this principle is applied to the misconduct of the agents of the insured, some qualification is necessary. The rule, in general, must be this: that the principal is liable for the defaults of his agents, when acting as such, and that he is not insured against loss thence arising,[2] unless it is clear that the insurer intended to take upon himself these risks. This may be made certain by express clauses in the policy, or by the customary and practical construction of common clauses. Barratry, is expressly mentioned in the policy, and will be considered presently. The master, officers, and crew, are the agents of the owner for many purposes; but, as a general rule, the insurers are not liable for a loss against which they insured the owner, if it be caused, directly, by the mistake, ignorance, or neglect, of the master or crew. There is scarcely any department of the law, in which the liability of a principal for the acts of his agent, has not caused much difficulty; and

dent unconnected with her unseaworthiness, she was wrecked. If she had been seaworthy when she left the harbor, and had prosecuted her voyage without being brought up in the roadstead, there was strong reason for believing that she would have weathered the storm and reached her port of destination in safety. It was contended on this state of facts, that as the proximate cause of the loss was a peril insured against, the underwriters were liable, although the remote cause was the negligence of the owners. And it is difficult to see why this argument should not prevail, if the underwriters would be liable in such a case for the negligence of the master. There seems to be no reason why the underwriters should be responsible for the acts of the servant, and not for those of the owner. The doctrine *causa proxima non remota spectatur* would seem equally applicable. But the court held, as we think rightly, that the negligence of the owner was the *causa sine qua non*, and that the underwriters were therefore not liable.

[1] Am. Ins. Co. *v.* Ogden, 20 Wend. 287.

[2] Thus it has been held in England, that if the goods insured are libelled for salvage in the Admiralty Court, and the master neglects to tender a specific sum for salvage, and to offer to pay costs, the insurers are not liable for the expenses incurred in that court. Rosetto *v.* Gurney, 11 C. B. 176, 7 Eng. L. & Eq. 461. But we doubt whether such would be the rule in this country. So if the goods are lost by capture, owing to the neglect of the captain to claim them as his own, there being an agreement to that effect existing between the captain and the insured, it has been held that the underwriter is not liable. Himely *v.* Stewart, 1 Brev. 209. And in Vos *v.* United Ins. Co., 2 Johns. Cas. 180, 187, the court said: "The act of the master must be referred to his principal who appoints him, and whenever a loss happens through the master's fault, unless that fault amounts to barratry, the owner, and not the insurer, must bear it." See also, Goix *v.* Low, 1 Johns. Cas. 341; Andrews *v.* Essex F. & Mar. Ins. Co., 3 Mason, 6; Howland *v.* Mar. Ins. Co., 2 Cranch, C. C. 474.

this is eminently true of the law of insurance. One of the most difficult of those questions arises when there is a loss caused by the unseaworthiness of the ship, but this unseaworthiness is caused by the negligence of the master and crew. We endeavor to present the existing condition of the adjudication on this subject in our note.[1]

[1] This question, how far the underwriters are liable for a loss caused by a peril insured against when the vessel is in an unseaworthy condition, owing to the negligence of the master and crew, does not seem to be entirely settled by the authorities. It is very clear that the underwriters do not insure against the negligence of the master and crew, nor losses arising directly from such negligence. And it was formerly held in England, that where the loss was the direct consequence of such negligence, no action would lie, although the immediate cause of the loss was a peril insured against. Law *v.* Hollingsworth, 7 T. R. 160. The negligence being regarded as the *causa sine qua non*, the efficient cause of the loss. But in Busk *v.* Royal Exch. Ass. Co., 2 B. & Ald. 73, it was held that the underwriters were liable for the loss of a vessel by a fire caused by the negligence of the mate in lighting a fire in a stove, and not seeing that it was properly extinguished, the fire being regarded as the proximate and the negligence as the remote cause of the loss. In this case the insurance was against fire, and barratry, and the court held that as the insurers had undertaken to indemnify the plaintiff for the wilful misconduct of the master and crew, it was not too much to say that they also meant to indemnify him against a loss arising from the negligence of the same persons. But the Supreme Court of New York, in a very similar case decided two years previous, said: "The very circumstance of assuming the risk of barratrous conduct, affords a strong presumption that the underwriters are responsible only for such misconduct as amounts to barratry." Grim *v.* Phœnix Ins. Co., 13 Johns. 451, 458. This seems much more in accordance with principle, than the reasoning of the English court. It is now, however, settled both in England and in this country, that if the loss is caused by a peril insured against, the underwriters are liable, although the remote cause be the negligence of the master and crew, and this whether barratry be insured against or not. Walker *v.* Maitland, 5 B. & Ald. 171; Shore *v.* Bentall, 7 B. & C. 798, n.; Bishop *v.* Pentland, 7 B. & C. 219, 1 Man. & R. 49; Dixon *v.* Sadler, 5 M. & W. 405, 415, 8 M. & W. 895; Redman *v.* Wilson, 14 M. & W. 476; Patapsco Ins. Co. *v.* Coulter, 3 Pet. 222; Waters *v.* Merchants' Louisville Ins. Co., 1 McLean, C. C. 275, 279, 11 Pet. 213; Williams *v.* Suffolk Ins. Co., 3 Sumner, 270, 276; Fireman's Ins. Co. *v.* Powell, 13 B. Mon. 311, 318; Draper *v.* Comm. Ins. Co., 4 Duer, 234, 239; St. Louis Ins. Co. *v.* Glasgow, 8 Mo. 713; Henderson *v.* Western Mar. & F. Ins. Co., 10 Rob. La. 164; Georgia Ins. & Trust Co. *v.* Dawson, 2 Gill, 365; Am. Ins. Co. *v.* Insley, 7 Barr, 223; Nelson *v.* Suffolk Ins. Co., 8 Cush. 477, 496. In Ohio, it was held in several cases, that the underwriters were not liable in the case in point. Gazzam *v.* Ohio Ins. Co., Wright, 202; Jolly *v.* Ohio Ins. Co., Wright, 539; Lodwicks *v.* Ohio Ins. Co., 5 Ohio, 433; Fulton *v.* Lancaster Ohio Ins. Co., 7 Ohio, 5; Howell *v.* Cincinnati Ins. Co., 7 Ohio, 276; but these cases have since been overruled by Perrin *v.* Protection Ins. Co., 11 Ohio, 147. In Massachusetts, it was held in an early case, that the underwriters were not liable for a capture, occasioned by the negligence of the master. Cleveland *v.* Union Ins. Co., 8 Mass. 308, but this doctrine is virtually departed from in the case of Nelson *v.* Suffolk Ins.

If the fault of his servants subjects the ship-owner to a claim for compensation by the shippers of cargo, this does not, of itself, exonerate the insurers of the cargo,[1] although, if the shippers, in such a case, claim of the insurers, they must enforce their claim against the ship-owner for the benefit of the insurers, or transfer it to them, nor will any loss be attributed to the fault or misconduct of the master or crew, which can be as well accounted for by the perils insured against.[2]

The general principle, that one is answerable for the acts of his agent, only when those acts are done during the exercise of the agency, applies to the master and crew, so far that if they commit larceny, or violence, or any other crime, the owner cannot be responsible for this, nor lose his claim on the insurers for a loss arising from it, unless he can be connected with this act, either by the authority, or directions he gave, or in some other way, and not merely by the fact that he appointed and employed them in his ship. Agents expressly appointed, or factors or consignees represent the owner in all the business which they undertake, by his authority, to do for him, and he is liable for their acts or neglect while they so represent him.[3] But no one is an agent of the owners for any purpose, although he performs a service for which the owner must pay, unless the owner

Co., *supra*. In Waters *v.* Merchants' Louisville Ins. Co., *supra*, two questions were raised, first, whether the underwriters were liable for a loss occasioned by the barratry of the master and crew, and second, whether they were liable for a loss occasioned by the negligence of the same persons. Speaking of the first, Mr. Justice *Story* said: "We have no hesitation to say, that a loss by fire caused by the barratry of the master or crew, is not a loss within the policy. Such a loss is properly a loss attributable to the barratry, as its proximate cause, as it concurs as the efficient agent, with the element, *eo instanti*, when the injury is produced." There seems to be no good reason why the same line of argument should not apply to the case of a loss by negligence, but the court held that it did not. It appears to us impossible to reconcile these cases with the authorities cited ante, p. 140, n. 1. See also, post, § 3, of this chapter.

[1] Cullen *v.* Butler, 5 M. & S. 461, 466.

[2] See Potter *v.* Suffolk Ins. Co., 2 Sumner, 197.

[3] See Tanner *v.* Bennett, Ryan & M. 182; Ludlow *v.* Col. Ins. Co., 1 Johns. 335; Low *v.* Davy, 5 Binn. 595. In Wilbraham *v.* Wartnaby, Lloyd & W. 144, the agent of the consignor at the port of destination, acting under the impression that the importation was prohibited, and that he was doing the best for all parties, gave information to the government, expecting thereby that he should obtain a restoration of the goods if they should be seized. They were seized before landed, and the underwriters set up in defence that but for the act of the agent they would not have been seized until after the expiration of the risk, but the court held them liable.

voluntarily employed him. Therefore he is not responsible, so as to discharge the insurers, for a loss occasioned by a pilot whom he was required by law to take.[1] Nor could he be for the loss caused by the ignorance or negligence of a pilot who was employed voluntarily, if he had exhibited to the master the customary evidence that he was duly commissioned. If, indeed, a master employed an incompetent person as pilot, whom he had no sufficient reason to believe competent, this would be an act of negligence on the part of the master, the effect of which upon the owner or insurers would be determined by the principles above stated.

A very universal rule, coming frequently into application, limits the responsibility of the insurers to extraordinary risks. We have already seen, that the insured always warrants by construction of law, that his ship is able to encounter safely all ordinary risks, for this is precisely what is meant by sea-worthiness; and it amounts to an agreement to warrant the insurers against all ordinary risks.[2] And if a vessel be lost or injured and the loss evidently arose from an ordinary peril, as from common weather, or the common force of the waves or winds, the insurers are not liable, for the very reason that the ship is warranted as able to withstand such assaults.[3]

And even if the peril itself be extraordinary, as stranding, the insurers are answerable only for such consequences of this as are extraordinary; at least, not for such as are invisible, indefinite, and conjectural; such as a straining, unless it is of such a nature as to cause a direct damage to the vessel.[4] So they are not lia-

[1] See ante, Vol. I. p. 484–486.

[2] Crofts *v.* Marshall, 7 Car. & P. 597. In Barnewall *v.* Church, 1 Caines, 217, 234, Mr. Justice *Thompson* said: "The insurer undertakes only to indemnify against the extraordinary and unforeseen perils of the sea, not against the ordinary perils to which every ship must be exposed in the usual course of the voyage proposed." See also, Coles *v.* Mar. Ins. Co., 3 Wash. C. C., 159.

[3] See post, p. 220, n. 1.

[4] In Sage *v.* Middletown Ins. Co., 1 Conn. 239, 243, the injury complained of by straining, was of such a nature, that it could not be repaired, otherwise than by rebuilding the ship. The Court said: "The allowance of such a claim would open a door for infinite fraud, imposition, and uncertainty, and end in the destruction of all that is valuable in insurance." The question came up, but was not decided, in Peele *v.* Suffolk Ins. Co., 7 Pick. 254. *Parker*, C. J., said: "The mode of computation is of a very questionable character. Indeed, we cannot but think there has been a

ble for the effects of time; or of wear and tear.[1] But though an old vessel when injured, may require more repairs than a new one would, yet it has been held, that the insured are entitled to have her put in the same condition she was in before the accident.[2] But this rule must be qualified, and we think should be stated as follows: The underwriters are liable for all damages caused by a peril insured against, which happens to a sea-worthy ship, even though this damage be greater than would have resulted, had the vessel been stronger. The underwriters are not liable for ordinary leakage; but this is sometimes expressly provided for. So should the rule be as to common breakage, or similar deterioration.[3] And, if cables, sails, rigging, anchors, boats, or the like, give out and are lost, under ordinary circumstances, without peculiar strain or any known extraordinary risk, the loss will be attributed to wear and tear.[4] In some instances,

straining of the cause, as well as of the vessel, in order to charge the underwriter." See also, the dictum of *Putnam*, J., in Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456, 466. In Giles *v.* Eagle Ins. Co., 2 Met. 140, the vessel was repaired so as to be sea-worthy, and afterwards performed her voyages well, and was insured at the same premium, and at the same valuation as before the damage, but the jury allowed for "damage of hogging and strain, $835." It was proved, that the whole body of the vessel was injured, that some of the timbers were lifted, some of her treenails started, and that the injury from the strain or hogging remained after the repairs, and affected not only the beauty but the strength of the vessel, and could not be perfectly repaired, except by rebuilding the vessel. The court held that the plaintiff was entitled to recover. *Putnam*, J., said: "We do not intend to shake the doctrine which we have recognized touching imaginary or theoretical strains. It may be, theoretically speaking, that whenever a ship takes the ground, all her timbers, from the keel to the water-ways, must of necessity be in some degree disjointed. But this is not such a case. Here the damage is actual, visible, and tangible. And if this vessel should hereafter take the ground, or encounter extraordinary seas, it is not to be expected that she would stand the shock as well as if her timbers had not been lifted and disjointed."

[1] Fisk *v.* Commercial Ins. Co., 18 La. 77; Coles *v.* Mar. Ins. Co., 3 Wash. C. C., 159; Dupeyre *v.* Western M. & F. Ins. Co., 2 Rob. La. 457.

[2] Fisk *v.* Commercial Ins. Co., *supra*.

[3] Mr. Benecke, Phillips' Ed. 443, says: "According to the custom at Lloyd's, the underwriters are liable for breakage and leakage only, if the vessel struck the ground with such violence as to derange her stowage. Whenever a loss for leakage is claimed in such cases, the ordinary leakage to which the article would have been subject, without such an event, ought to be deducted."

[4] Thus, where an anchor is lost by the cable being chafed upon a rocky ground, it is not a loss by a peril of the sea. Valin, tit. Ass. art. 29; Benecke on Av. ch. IX., Phillips' Ed. 379. See also, 1 Phillips, Ins. § 1105; Coles *v.* Marine Ins. Co., 3 Wash. C. C., 159; Dupeyre *v.* West. Mar. & F. Ins. Co., 2 Rob. La. 457.

the nature of the loss determines this question. If a rope gives way, generally, it would be because it was not strong enough. If timbers are broken, the injury would generally imply extraordinary violence. If the damage or loss fall on the spars, the sheathing, or upper works, or boats, there must always be an inquiry into the circumstances of the case, into the degree of violence which caused the loss, and the manner in which the lost article was secured against injury. Thus, if a boat is lashed on deck, only extreme violence would tear it away. If hung from the davits, at the stern or side, it is easily lost by no uncommon peril, and it may be a question whether it was so secured at that very time, as to be sea-worthy, that is, able to encounter the perils it must be expected to meet. So the indefinite deterioration of the ship by straining, the opening of seams, or buttends, without a storm, or violence, and the like, are not covered by the policy.[1] Another rule, quite as universal, exempts the insurers from all liability for a loss caused by the qualities of the thing lost. Articles of commerce which are subjects of insurance, differ so materially in their liability to decay, that provision is made for this by the memorandum, as we have seen.

It is also a rule, that the insurers are liable for no subject-matter of insurance, which is destroyed by reason of its own inherent defects, or tendencies.[2] But this rule does not apply to tendencies which are called into activity only by a peril insured against. Thus, if hemp insured, burns up or rots from spontaneous ignition or fermentation, it being known that this may happen if the hemp be damp, but not if it be dry, the question would be, whether it was damp or dry when it was put on board. If it were then damp, or if it were then dry but became damp through the fault or defect of the ship, the insurers would not be liable, either for the hemp, or for the ship, if the burning hemp destroyed the ship. But if the hemp were dry when laden, and was afterwards wet by reason of the straining of the ship in a storm, or by the shipping of a sea, or any like peril, then the insurers, whether on the ship or cargo, would be liable.[3]

[1] See *supra*, p. 214, n. 4.

[2] Emerigon, c. 12, § 9, Meredith's Ed. p. 311.

[3] In Boyd *v.* Dubois, 3 Camp. 133, insurance was effected on hemp, on a voyage from London to the coast of Devonshire. On the voyage, a fire broke out in the night,

SECTION II.

OF LOSSES ARISING FROM A PROHIBITED OR CONTRABAND TRADE.

This subject has already been considered in some of its relations. Here we would remark, that insurers are responsible for losses caused by a breach of the laws of foreign countries respecting revenue and trade, unless some express exception is added in their favor, provided they had, in any way, either notice or knowledge, or should have inferred from facts in their possession, that it was the intention of the insured to engage in such a trade.[1] And even if there be a warranty against prohibited trade, if goods specifically named are known to be prohibited at the port to which the ship is expressly destined, it has been held that the insurers are liable for a loss of the property by a seizure for a disregard of the prohibition.[2] It is, however, an

and the greater part of the cargo was consumed. Lord *Ellenborough* said: "If the hemp was put on board in a state liable to effervesce, and it did effervesce, and generate the fire which consumed it, upon the common principles of insurance law, the insured cannot recover for a loss which he himself has occasioned."

[1] See ante, p. 19, n. 1.

[2] Seton *v.* Delaware Ins. Co., 2 Wash. C. C. 175. Insurance was effected on cargo to ports in Cuba and back, declared in a written clause to be on goods and specie, both or either, valued at a certain sum, with the usual printed clause of warranty against any charge or loss on account of any illicit or prohibited trade. Mr. Justice *Washington* admitted that the printed and written clauses were to be construed so as to give effect to both, but held that as specie would have been included in the general term goods, and as specie was known to be prohibited, the clause meant "we do not know what the goods are, we therefore do not insure them against illicit or prohibited trade, but we do insure the specie." In a *nisi prius* case in New York, the decision was put on the ground that the printed clause was controlled by the written. *Van Ness*, J., said: "There can be no question but that the insurers assume the contraband risk, when contraband articles are set forth and expressly named in the policy. Such specification must be considered as notice to the insurer, and will control the printed clause." Howland *v.* Comm. Ins. Co., Anthon, N. P. 26. But in Goicoechea *v.* Louisiana State Ins. Co., 18 Mart. La. 51, the court held that as the printed and written words would stand together, the latter should not control the former, but the insurers should be held only for loss caused by perils of the sea on the voyage, and not for illicit trade, although the cargo was described in the policy as Spanish, and was condemned on that account. And it is clear that where the warranty is in writing,

unquestionable rule, that if the policy contains an exception of all risks from contraband, war, or illicit or prohibited trade, and a part of the property insured is exposed to that danger, and a loss accrues therefrom to that part or to the residue, the underwriters are not held, unless there is something in the policy which must be regarded as controlling or limiting that exception.[1] If such trade is intended, and no notice, and nothing equivalent to notice, is given to the insurers, they are not responsible for a loss caused by such trade.[2] But if without any such intention, there was an actual violation of some foreign law without the knowledge or the default of the owner or his agents, the insurers may be responsible. But the question is one of some difficulty. Thus, if war begins after the policy is made, the insurers are held for any loss caused by violation of any ordinances or rules springing from a state of war, until such notice reaches the insured or his agent, as makes the violation of these rules or ordinances his default.[3] If there is a loss by capture for a

the underwriters are not liable. Church *v.* Hubbart, 2 Cranch, 187, 232; Higginson *v.* Pomeroy, 11 Mass. 104.

[1] See post, section 9.

[2] Thus in Andrews *v.* Essex F. & M. Ins. Co., 3 Mason, 6, 17, Mr. Justice *Story* said: "It is perfectly settled that the underwriters, by the general terms of the policy, are not liable for any loss arising from foreign illicit trade, unless the policy be underwritten with the full knowledge on their part that such was the object of the voyage. This is the general doctrine of foreign maritime writers, and has been recognized in the fullest manner by the common law tribunals." See 2 Valin, lib. 3, tit. 6, art. 49; Richardson *v.* Maine Ins. Co., 6 Mass. 102; Parker *v.* Jones, 13 Mass. 173. See also, ante, p. 169, n. 3.

[3] Wood *v.* New England Mar. Ins. Co., 14 Mass. 31. In this case the policy contained the following memorandum: "It is understood the company are not liable for any loss or expense arising from the violation of the existing laws or regulations of any of the belligerent powers restricting neutral commerce." The vessel was captured by a French vessel under the Milan decree, which had not been promulgated at the time the policy was made, on the pretext that the ship had come from a British port, and had been spoken with by British cruisers. It would appear by the language of the court on page thirty-six that the policy contained the usual clause insuring the vessel against arrest and detention, and the only question, therefore, was whether the Milan decree was an existing regulation within the memorandum; and the court held that it was not.

In Archibald *v.* Mercantile Ins. Co., 3 Pick. 70, and in Parker *v.* Jones, 13 Mass. 173, it was held that if a voyage is prohibited, and both parties are ignorant of the fact, the insurers are not liable. And in a case where a vessel sailed for a port which was at the time blockaded, both parties being ignorant of the fact, and the master, on

pretended violation of a blockade which did not actually take place, and the capture is therefore illegal, it would seem that the insurers should not be discharged.[1]

SECTION III.

OF THE MEANING AND EXTENT OF PERILS OF THE SEA.

A. *Of Perils generally.*

Those usually enumerated in American policies, are perils of the sea, fire, barratry, theft, piracy, capture, arrests, and detentions.[2] The general clause "all other perils" is usually restricted

learning it, discontinued his voyage and sailed for home, but was captured on the way, it was held that the underwriters were only liable for losses by perils insured against up to the time of the discontinuance of the voyage. Richardson *v.* Maine Ins. Co., 6 Mass. 102. In Andrews *v.* Essex F. & M. Ins. Co., 3 Mason, 6, 18, the port of destination was restricted from foreign trade, but it was believed by both parties that the trade would be lawful before the vessel arrived. In point of fact, the port was not open and the vessel was seized. It was argued that the underwriters, having insured the voyage to the port of destination, must be presumed to warrant an entry into the port for the purpose of inquiry. But Mr. Justice *Story* said: "The true principle seems to me to be this, that the policy guarantees an indemnity in going to the port against all losses by the perils insured against; and unless the peril of illicit entry at the port be contemplated as one of the risks insured against, the underwriters are not held." See also, in respect to the question whether a denial of entry at the port of destination is a risk within the common policy, post, section 7.

[1] Sawyer *v.* Maine F. & M. Ins. Co., 12 Mass. 291.

[2] The common clause in the English policies enumerating the perils is as follows: "Touching the adventures and perils which we, the assurers, are content to bear, and do take upon us in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people, of what nation, quality or condition soever, barratry of the masters and mariners, and of all other perils, losses, or misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship," etc. Vaucher's Guide, Mar. Ins. 88; 2 Arnould, Ins. 792. This clause has been modified in form in most of the American policies, and some changes have been made in the substance.

The perils usually enumerated in the Boston policies are, "of the seas, fire, enemies, pirates, assailing thieves, restraints and detainments of all kings, princes, or people, of what nation or quality soever, barratry of the master, unless the insured be owner of the vessel, and of mariners, and all other losses and misfortunes, which have, or shall come to the damage of the said ——, or any part thereof, to which

in its extent and operation by the enumerations of the perils in the policy, and embraces only other perils of the like kind. The phrase, perils of the seas, covers all losses or damage which arise from the extraordinary action of the wind and sea,[1] and from all inevitable accidents directly connected with navigation, excepting those provided for in other parts of the policy, as capture and the like.[2] But the destruction of a ship by worms is not a "peril of the sea," because it is not an *extraordinary* circumstance. In certain waters, and at certain seasons, it is a natural result of causes always in operation, which are to be expected, and may be perfectly prevented by adequate precautions; and it may be likened to a loss by wear and tear.[3] And so, if loss or damage be caused by rats or other vermin, it would seem that the insurer would not be liable unless the owner or the master had done all that could be done by any reasonable exertions or means to extirpate them, and without success.[4]

insurers are liable by the rules and customs of insurance in Boston." And they are substantially the same in our other commercial cities.

[1] What are ordinary, and what extraordinary perils, is a question of much difficulty. In Magnus *v.* Buttemer, 11 C. B. 876, 9 Eng. L. &. Eq. 461, a vessel in the ordinary course of her voyage, moored in a tide harbor, and took ground when the tide fell. In consequence of this she was hogged and strained all over. It was held that the underwriters were not liable. In Potter *v.* Suffolk Ins. Co., 2 Sumner, 197, under very similar circumstances, Mr. Justice *Story* held, that unless there was inherent weakness in the vessel, such damage could only be occasioned by an unusual and extraordinary accident in grounding upon the ebbing of the tide, which would be a peril of the sea. And in Bullard *v.* Roger Williams Ins. Co., 1 Curtis, C. C. 148, Mr. Justice *Curtis* held that, although the law required vessels to be sufficiently strong to resist the ordinary action of the sea in the voyages for which they might be insured, yet that the ordinary action of the wind and sea did not mean the winds and sea to be ordinarily met in the voyage insured. He accordingly held that heavy cross seas were not the ordinary action of the sea within the meaning of this rule, however common they might be in the voyage insured. And in Washington Mut. Ins. Co. *v.* Reed, 20 Ohio, 199, underwriters on whiskey on board a flat boat were held liable for a loss occasioned by the swell of a steamboat, although the steamboat and the swell were of ordinary size and of constant occurrence.

[2] Schieffelin *v.* New York Ins. Co., 9 Johns. 21.

[3] Rohl *v.* Parr, 1 Esp. 445; Martin *v.* Salem Mar. Ins. Co., 2 Mass. 420; Hazard *v.* New England Mar. Ins. Co., 1 Sumner, 218, 8 Pet. 557.

[4] In Hunter *v.* Potts, 4 Camp. 203, goods were insured on a voyage from London to Honduras with leave to touch at Antigua. While at the last-named port, the timbers of the vessel were so damaged by rats that a survey was called, and the vessel condemned. Lord *Ellenborough* held that the underwriters were not liable. Chancellor *Kent*, 3 Comm. p. 300, says: "The better opinion would seem to be, that an insurer

If goods are damaged by actual contact with sea-water, the underwriters are certainly liable,[1] and it has been held that if part of the cargo is damaged by sea-water, and the vapor and gases arising from it injure another portion of the cargo which is insured, the underwriters on this latter portion are liable, although it was not immediately in contact with the sea-water.[2]

is not liable for this sort of damage, because it arises from the negligence of the common carrier, and it may be prevented by due care, and is within the control of human prudence and sagacity." But in Garrigues *v.* Coxe, 1 Binn. 592, a leak occasioned by rats, without the neglect of the captain, was held to be a peril within the policy.

In Dale *v.* Hall, 1 Wilson, 281, a common carrier was held liable for damage done to goods by rats gnawing a hole in the vessel. So in another case where the rats gnawed the goods. Aymar *v.* Astor, 6 Cow. 266. In a similar case in England, Laveroni *v.* Drury, 8 Exch. 166, 16 Eng. L. & Eq. 510, where a cargo of cheese was damaged by rats, the defence was set up that the captain had two cats on board. This would have been sufficient to exonerate the carrier according to the maritime law. Consolato del Mare, c. 65, 66; Casaregis, disc. 23, n. 73; Roccus, n. 58; Emerigon, c. 12, s. 4, § 7, Meredith's Ed. 302. But the court held that the carrier was liable, on the ground that damage done to goods by rats was not a peril of the seas, it being "a kind of destruction not peculiar to the sea or navigation, or arising directly from it, but one to which such a commodity as cheese is equally liable in a warehouse on land as in a ship at sea." The court said: "We further are very strongly inclined to believe that in the present mode of stowing cargoes, cats would offer a very slight protection, if any, against rats. It is difficult to understand how, in a full ship, a cat could get at a rat in the hold at all, or at least with the slightest chance of catching it."

But the question still remains, whether the underwriter would not be liable in case the rats should eat a hole in the ship, and water should enter and damage the cargo. In Laveroni *v.* Drury, *supra*, *Pollock*, C. B., said such a case might very likely be one of sea damage. And *Alderson*, B., added: "Our judgment does not touch that question. A rat making a hole in a ship, may be the same thing as if a sailor made one."

On the authority of the recent cases in this country, we should consider the insurers liable in such a case, even if the rats remained on board through the negligence of the master, on the ground that the damage by water was the proximate cause of the loss, but should not hold them liable if the goods were gnawed by the rats, that not being a peril peculiar to the sea.

[1] Baker *v.* Manuf. Ins. Co., Sup. Jud. Ct., Mass., March T. 1858, 14 Law Reporter, 203; Cogswell *v.* Ocean Ins. Co., 18 La. 84.

[2] Montoya *v.* London Ass. Co., 6 Exch. 451, 4 Eng. L. & Eq. 500. See also, Rankin *v.* Am. Ins. Co. of N. Y., 1 Hall, 619. But in Baker *v.* Manuf. Ins. Co., Sup. Jud. Ct., Mass., March T. 1851, 14 Law Reporter, 203, it was held that the underwriters were only liable for the damage done to those goods with which the sea-water came into actual contact, although the plaintiff offered to prove that the injury was not caused by the usual dampness in a vessel's hold, but by the steam and moisture arising from goods damaged by an unusual quantity of water entering the hold in consequence of a peril of the seas. We have examined the policy in this case, and find that it did not contain the clause, now common in Boston policies, which exempts the

Damage caused by a vessel's grounding or stranding is a loss by a peril of the seas within the policy, provided it does not happen in the usual course of navigation, as where a vessel is destined to a tide harbor, where she expects to take the ground when the tide ebbs.[1] And in such a case, if there be a heavy swell, which causes the injury, the underwriters are liable.[2] It is sometimes necessary to heave a ship down, and if she is injured while this is being done, there seems to be no good reason why it should not be considered as having happened by a peril of the sea, but it has been decided otherwise.[3] Such a damage would, however, be included within the general clause.[4]

underwriters from loss of this kind, and which is as follows: "It is further agreed that the insurers shall not be liable for damage or injury to goods by dampness, rust, change of flavor, or by being spotted, discolored, or mouldy, unless the same shall be caused by actual contact of sea-water with the articles so damaged." In a case where the policy contained this clause, it was held that the burden was on the assured to show that the damage was caused by actual contact with sea-water. Leftwitch *v.* St. Louis Perpet. Ins. Co., 5 La. Ann. 706.

[1] See the cases of Magnus *v.* Buttemer, 11 C. B. 876, 9 Eng. L. & Eq. 461; and Potter *v.* Suffolk Ins. Co., 2 Sumner, 197, cited ante, p. 220, n. 1. In Fireman's Ins. Co. *v.* Powell, 13 B. Mon. 311, the policy did not expressly insure against loss or injury from grounding, but provided that the assured were not to abandon, as for a total loss, on account of the steamboat's grounding or being otherwise detained. It was held that, as grounding was one of the perils to which steamboats were liable, and as it was not specially excepted, it was included in the policy.

[2] Fletcher *v.* Inglis, 2 B. & Ald. 315. This case was distinguished from that of Magnus *v.* Buttemer, *supra*, on the ground that the damage was not caused solely by the ship's taking ground in the usual course of her navigation, but by a heavy swell.

[3] Rowcroft *v.* Dunsmore, before Lord *Kenyon*, C. J., cited in Thompson *v.* Whitmore, 3 Taunt. 227, as follows: "The ship was hove down, and while heaving down, she could not bear the strain: she was drawn on the land, where she bilged; and the question was made, whether, it being necessary to perform this operation on her, this damage was occasioned by a peril of the sea. Lord *Kenyon* thought it was not a loss by a peril of the sea, but an accident that happened." In Thompson *v.* Whitmore, 3 Taunt. 227, the vessel had been placed on the beach to be cleaned and calked, in a situation where vessels of the same size had been placed for repairs, and had remained in safety. The vessel lay one day in safety, but the next day when the tide rose she was found to be full of water, and the planks of the side on which she lay, and some of her foot hooks were broken. "*Mansfield*, C. J., thought, that although the tides knocked away the shoars which supported the vessel, and thereby occasioned the mischief, yet, as the damage happened upon the land, it could not be considered as a loss sustained by the perils of the sea." This opinion was held to be

[4] Ellery *v.* New England Mar. Ins. Co., 8 Pick. 14; Phillips *v.* Barber, 5 B. & Ald. 161.

If a ship be not heard from, after a reasonable time it will be presumed that she has perished; and in the absence of all evidence or opposing circumstances, the presumption of law will be that she has perished by reason of some peril of the sea; for in point of fact this presumption will be probable and reasonable. But the length of time which must elapse before this presumption arises, must depend upon the peculiar circumstances of each case.[1]

The voyage of the ship may be greatly lengthened and her return to port delayed by circumstances which will give rise to the question, whether the insurers are liable for the loss and expense thence arising. From the adjudications of this country, it would seem, that if a vessel goes out of her intended course in fact, and in good faith, for the purpose of refitting herself, and repairing damages which have arisen from a peril insured against, she

correct by the full court. See also, Phillips *v.* Barber, 5 B. & Ald. 161, in which case the court held that where a vessel was in a graving dock being repaired, in which there were two or three feet of water, and, while there, was, by the violence of the wind and weather, blown over and bilged, this was not a loss by the perils of the seas.

[1] Gordon *v.* Bowne, 2 Johns. 150; Brown *v.* Neilson, 1 Caines, 525. In this case a vessel insured on a time policy, twenty-four days before the expiration of the risk, set sail from Norfolk in Virginia, bound to New York, and was never heard from. The usual passage was from five to seven days, though there was evidence of one case where a vessel arrived safe after a voyage of forty days, and another of a voyage of sixty days. The court held that there was no time fixed by law after which a missing vessel should be presumed to be lost, and that it would not be reasonable to calculate on the utmost or greatest limit. See also, Patterson *v.* Black, 2 Marsh. Ins. 781; Watson *v.* King, 1 Stark. 121; Houstman *v.* Thornton, Holt, N. P. 242. The plaintiff must prove that when the vessel left the port of outfit she sailed on the voyage insured, and the convoy bond, executed at the custom-house, in which the port of destination is mentioned, is *primâ facie* evidence of this fact. Cohen *v.* Hinckley, 2 Camp. 51. When a vessel sails for a foreign port, it is not necessary to prove that she never arrived there, by witnesses from that port. Twemlow *v.* Oswin, 2 Camp. 85. Where goods are insured by a certain ship, and it is proved that she sailed on the voyage insured, and never arrived, and one of the plaintiff's witnesses testified that three or four days after the vessel sailed he had heard that she had foundered at sea, but that the crew were saved, it was held not to be incumbent on the plaintiff to call some of the crew, or to show that he had ineffectually endeavored to procure their attendance. Koster *v.* Reed, 6 B. & C. 19. So, if the ship is warranted free from capture and seizure, it is not incumbent on the plaintiff to prove that the loss did not happen by these perils, if the vessel has never been heard from, although the loss in the declaration is said to be by foundering at sea. Green *v.* Brown, 2 Stra. 1199. See also, Newby *v.* Read, Park, Ins. 85.

goes and remains while thus necessarily deviating, at the expense of the underwriters; and, that the costs incurred by the owner, for wages and provisions of the crew during the repairs, and during the deviation and delay for repairs, are to be repaid by the insurers.[1]

If the vessel enters a port in the course of the voyage, and is there detained by winds, ice, or other causes which might under other circumstances be classed among perils of the seas, the whole cost of such delay and detention must be borne by the owner, if the voyage insured is afterwards performed.[2]

B. *When, and how far, Collision is a Peril of the Sea.*

The usual and common instances of collision are obviously produced by causes, which are most certainly among the perils of the sea. They are the winds, waves, currents, or tides. And so far as these cause a collision, there can be no question of the liability of the insurer.[3] But where the collision is caused only in part by the extraordinary violence or unexpected operation of the wind or water, and in part by the negligence of the master and the crew, the question might arise, how far the insurers were responsible. And this question would seem to be still more difficult, when there was no extraordinary or unusual action of wind or sea, and none which might not have been, and should not have been anticipated and prepared for, and the collision took place, because the master and crew were wholly wanting in skill or care. And the case sometimes occurs, where the collision is purposely caused by the master or crew, and is to be attributed exclusively to their intention and act.

The answer to this question is, that although the insurers do not insure the ship-owners against negligence on the part of the master and crew, yet, as we have already seen, they are liable for damage caused by a peril of the sea, though that peril be put

[1] Expenses of this nature are generally settled in this country, by a general average contribution, as we have seen in our first volume, to which we refer. See Vol. I. p. 294–296, and notes, where this question is fully considered. See also, post, tit. Partial Loss.

[2] Everth *v.* Smith, 2 M. & S. 278.

[3] See Buller *v.* Fisher, 3 Esp. 67.

into operation by the negligence of those in charge of the vessel.[1]

If the collision be caused entirely by the wilful act of the master and crew, we should say, that the insurers were still liable, unless the circumstances were such, as to give rise to the question of barratry. We know no direct authority upon the question, how far such an act would be barratrous. At one time it would, perhaps, have been necessary to prove, in order to make it barratry, that the motive of the act was one of hostility to the ship-owner. We apprehend, however, that this would now be presumed, perhaps absolutely, from the act itself. And, that insurers would not be liable for damages caused by a collision, intentionally and maliciously, and without excuse or necessity, caused by the master and crew of the ship insured, unless there was insurance against barratry.[2]

C. *For what Effects of Collision nsurers are Answerable.*

It has already been stated, in our first volume,[3] that the rule in this country is, that the party in fault, must suffer his own loss and compensate the other party for the loss that he may sustain. But if neither be in fault, the loss rests where it falls. If both are substantially in fault, the loss also rests where it falls, by the rules of the common law, but is divided equally between the parties by the rules of the admiralty law.

The qualifications to this rule, and the applications of it, so far as they belong to the Law of Shipping are there considered. But in the Law of Insurance, this rule has given rise to questions of great difficulty and importance.

[1] This was admitted by *Curtis*, J., in General Mutual Ins. Co. *v.* Sherwood, 14 How. 351; and cannot be disputed, if the present interpretation of the doctrine of *causa proxima non remota spectatur*, be correct. See Nelson *v.* Suffolk Ins. Co., 8 Cush. 477, and other cases cited in this section, all of which admit that the underwriters are liable for the damage done to the vessel insured.

[2] We are not aware that this precise question has arisen; but it would seem, that in such a case, according to the authorities, the loss by collision would not be the proximate cause of the loss if superinduced by barratry, though it would if there had been no barratry, but merely negligence. See Waters *v.* Merchants' Louisville Ins. Co., 11 Pet. 213, cited ante, p. 213, note.

[3] Vol. I. p. 187.

If a vessel suffers from a collision without any fault on either side, or with mutual fault, it has no claim against the other, and is subject to no claim by the general law of shipping. And here the insurers simply pay for the damage sustained, deducting one third off, new for old.

If the vessel suffers from the fault of another vessel, she has a claim for compensation against the vessel in default; and the insurers are still liable for the loss,[1] but are subrogated to the rights of the insured, and so acquire their claim against the injuring vessel.

If the ship is injured by her own fault, and by the same fault and the same collision injures another, and is obliged to make compensation, the loss of the owners of the ship in default, has two elements; one, the direct loss his ship sustains; the other, the loss he sustains by being obliged to pay for the injury which his vessel has caused.

For the first of these, the insurers are certainly liable. Whether they are for the other, has been the subject of some litigation. In Massachusetts[2] and in New York[3] it has been held, that the insurers are liable for the whole loss, consisting of both of these items, because the whole loss is caused by collision, and that is a peril insured against. But by the Supreme Court of the United States,[4] reversing the decision of the Circuit Court,[5] and also by a judgment of the Court of Appeals of New York,[6] overruling a decision in the Supreme Court of that State,[7] it is now held, that the insurers are only liable for the damage sustained by the vessel insured, if the collision is caused by the fault of the

[1] Smith *v.* Scott, 4 Taunt. 126. It was proved in this case, that the collision was caused by the grossest negligence on the part of the colliding vessel. It was argued, that the negligence was the cause of the loss; but *Mansfield*, C. J., said: "I do not know how to make this out not to be a peril of the sea. What drove The Margaret against The Helena? the sea! What was the cause that the crew of The Margaret did not prevent her from running against the other, their gross and culpable negligence? but still the sea did the mischief."

[2] Nelson *v.* Suffolk Ins. Co., 8 Cush. 477. It was so held also, by Mr. Justice *Story*, in Hale *v.* Washington Ins. Co., 2 Story, 176.

[3] Matthews *v.* Howard Ins. Co., 13 Barb. 234.

[4] Gen. Mut. Ins. Co. *v.* Sherwood, 14 How. 351.

[5] Sherwood *v.* Gen. Mut. Ins. Co., 1 Blatchf. C. C. 251.

[6] Matthews *v.* Howard Ins. Co., 1 Kern. 9.

[7] Matthews *v.* Howard Ins. Co., 13 Barb. 234.

officers and crew of that vessel, and are not liable for the compensation due from it for the injury inflicted upon the other vessel. The general reason for this decision is, that the insurers of the ship in default, have not insured the owners of the ship injured,[1] nor have they insured the owners of the ship in fault against a mere indebtedness thrown on them by the default of their own servants. And, while the negligence or other default of persons employed by the insured, may not be a good defence of the insurers against a claim for a loss, which is itself insured against, such negligence or default cannot be itself the foundation of a claim against the insurers.

The principle which governs this case is, that the proximate cause only is to be regarded, and the remote cause disregarded. And, while the law will hold the insurers of the ship in fault liable for the injury immediately caused to the insured by the negligence of their servants, it does not pursue the chain of effects, and hold these insurers liable to the owners for the

[1] This point, though presented with great ability by the learned counsel for the defendants in the case of Nelson *v.* Suffolk Ins. Co., 8 Cush. 477, 480, does not appear to have been much relied on by the court in General Mut. Ins. Co. *v.* Sherwood, 14 How. 351. The argument is this: "A policy on a vessel insures that particular vessel. In fixing the amount of the premium and determining what sum shall be put at risk, the underwriter is materially influenced by the age, size, and strength of the vessel which is the subject of the policy. But the claim made by the plaintiffs introduces into the contract another vessel, about which the underwriter had no means of obtaining any knowledge, but which he is nevertheless, to stand as insurer of, against the peril of collision from negligence." The answer to this is, that there are many expenses and charges for which the underwriter of a ship is liable, which flow incidentally from a peril insured against, and are not a direct damage to the vessel; as where "a ship is insured against the perils of the sea, a part of the cargo is thrown overboard by reason of a peril of the sea, and the ship and owner become at once chargeable for a proportion of this loss of the cargo, and the underwriter is held bound by the policy to indemnify the owner of the ship for the sum he has to pay, to make up the loss of the cargo." 8 Cush. 492. But this hardly seems to meet the case. Suppose, for instance, that a house is insured against fire, and is burned by the negligence of the servants of the insured, and this fire communicates to an adjoining house, would it be pretended that the insurer was liable for the whole damage done to both houses, even though there should be a law compelling the owner of the house insured to pay the owner of the other house, for the damage done by his servants?

It was also urged, on the part of the plaintiffs, that the collision diminished at once the value of the vessel insured by the amount which she would have to pay, since there was a lien on her to that amount. But this point was not relied on by the court, and we think it is a sufficient answer to it, to say, that there was not necessarily a lien *in rem*, as the owners of the injured vessel might have proceeded *in personam*.

money, which a rule of admiralty, or of the law of shipping, requires them to pay to others for the damage their servants do them.[1]

We think, that the decision of the Supreme Court of the United States rests upon the better reason, and a just application of indisputable principles. But a similar application of the same principles, would require the court to abandon the ground formerly taken by them in another case. That was a case of collision in the River Elbe, whereby the vessel insured, without default, came into collision with another vessel. By a law of Hamburg, which governed the place where the collision took place, the loss, when there was no fault, was divided between the two

[1] We consider that this question turns and depends for its solution, altogether upon the interpretation to be given to the maxim, *causa proxima non remota spectatur*. We have already had occasion to consider this question, as to how far the underwriters are generally liable for a loss caused by the negligence of the servants of the assured, (see post, p. 212, n. 1), and shall therefore speak of the question here only, so far as it is especially applicable to loss by collision, as we shall, in a subsequent section, have occasion again to refer to it, in considering the question, which peril is the proximate one, when a loss is occasioned by two or more causes and only one is insured against. Mr. Justice *Curtis*, in General Mut. Ins. Co. *v.* Sherwood, 14 How. 351, 366, states the rule thus: "In applying this maxim, in looking for the proximate cause of the loss, if it is found to be a peril of the sea, we inquire no further; we do not look for the cause of that peril. But if the peril of the sea, which operated in a given case, was not of itself sufficient to occasion, and did not in and by itself occasion the loss claimed, if it depended upon the cause of that peril, whether the loss claimed would follow it, and therefore a particular cause of the peril is essential to be shown by the assured, then we must look beyond the peril to its cause, to ascertain the efficient cause of the loss." This rule, it will be perceived, admits that the underwriters are liable for a loss by a peril, although that peril would have been safely encountered but for the negligence, and the rule is limited to the case where the peril would; of itself, have been insufficient to occasion a loss. That is, in the case at bar, the owners of the vessel insured would not have been liable for a loss by collision, unless that collision was caused by negligence on the part of their servants, and their only claim against the underwriters was founded on the fact of such negligence, as their liability was imposed upon them by that fact, and consequently, the negligence was properly considered as the cause of the loss. The language of the court above cited, is the subject of an able and elaborate criticism in Nelson *v.* Suffolk Ins. Co., 8 Cush. 477, 498, in which it is contended, that the negligence, though an element in the case, is not the proximate cause of the loss. *Fletcher*, J., said: "The negligence cannot be set up as a distinct, substantive, proximate cause of the payment, upon any other ground than that the payment was a penalty for the negligence; and if so, the penalty should be measured by the negligence, and exacted, even though there should be no damage from the collision. But surely there was no penalty to be measured by the negligence, but the payment of the actual, carefully ascertained damage caused by the collision, which is, of course, the proximate cause of the payment."

ships; instead of resting where it fell, as it does by the common law and the law-merchant generally. Mr. Justice *Story* held, that the insurers of the ship were obliged to pay, not only for what she herself suffered, but for all the money awarded to the other ship, by the law requiring a division of the loss.[1] And the Supreme Court unanimously affirmed his decision.[2]

Two years before the trial of this case before Mr. Justice *Story*, the very same question came before the King's Bench in England, Lord *Denman* presiding, in reference to a ship injured without default, by collision in the River Hoogly, and compelled by a similar law of Calcutta, to pay for a part of the injury sustained by the other vessel. The English court held, that this part of the loss was too remote; and that the insurers should pay only for the injury sustained by the vessel insured.[3]

We think this last a just decision; and are quite sure, that the same principles which were acknowledged and applied by the Supreme Court of the United States, in General Mut. Ins. Co. *v.* Sherwood,[4] and by the New York Court of Appeals in Mathews *v.* Howard Ins. Co.,[5] would lead directly and necessarily to the conclusion to which the English court came in De Vaux *v.* Salvador,[6] although a distinction has been pointed out between these cases.[7]

[1] Peters *v.* Warren Ins. Co., 3 Sumner, 389.

[2] Peters *v.* Warren Ins. Co., 14 Pet. 99.

[3] De Vaux *v.* Salvador, 4 A. & E. 420. The decision in this case was given by Lord *Denman*, C. J., who, in a letter to Mr. Charles Sumner, dated Sept. 29, 1840, published in 2 Story's Life and Letters, 379, said: "Your report of Judge Story's sentiments on our decision in De Vaux *v.* Salvador had not escaped my memory, and his now recorded judgment makes me regret, that we did not grant a rule to show cause, that a full discussion of the point might have been had. If it should arise again, the case of Peters *v.* Warren Ins. Co. will, at least, neutralize the effect of our decision, and induce any of our courts to consider the question as an open one." But in Thompson *v.* Reynolds, 7 Ellis & B: 172, 40 Eng. L. & Eq. 54, 57, where there was a special clause, providing that the underwriters should be liable in such a case, Lord *Campbell*, C. J., said: "It is quite clear, that it is only by virtue of this special clause, that such a claim as this can be sustained, and it must be limited by the terms of that clause."

[4] 14 How. 351.

[5] 1 Kern. 9.

[6] 4 A. & E. 420.

[7] In General Mut. Ins. Co. *v.* Sherwood, 14 How. 351, *Curtis*, J., said: "It has been urged, that in the case of The Paragon (Peters *v.* Warren Ins. Co., 14 Pet. 99), this court adopted a rule which, if applied to the case at bar, would entitle the insured

Policies of insurance often now settle this question by providing that the underwriters shall be liable for such a loss.[1]

The liabilities of underwriters under this special clause, or under the law as now established in Massachusetts, must, of course, be limited to the amount which the insured owners were bound to pay under the statutes limiting their personal responsibility. This question we have already considered, at much length, in our first volume.[2]

to recover. But we do not so consider it. It was there determined that a collision without fault was the proximate cause of that loss. Indeed, unless the operation of law, which fixed the lien, could be regarded as the cause of that loss, there was no cause but the collision, and that was a peril insured against." If, however, we apply the rule laid down by Mr. Justice *Curtis*, above referred to, it is evident, that the collision was but the remote cause of the loss, and the peculiar law of the country the proximate cause; for it is very certain that the collision itself imposed no liability upon the ship by the general maritime law. The distinction above taken may be termed a metaphysical subtlety, but we think distinctions of this nature are justifiable, when the rule itself is but a metaphysical subtlety, since it declares that where the loss is occasioned by a peril superinduced by the barratry of the master of the vessel, or by the negligence of the owner himself, the underwriters are not liable, on the ground, that in the one case, the barratry is the proximate cause of the loss, and in the other, the negligence is the *causa sine qua non*, while in the case of a peril superinduced by the negligence of the master of the vessel, the negligence is considered as the remote cause of the loss. It may be remarked, also, that Mr. Justice *Story* considered the two cases as resting on the same basis by his decision in Hale *v.* Washington Ins. Co., 2 Story, 176, which case was decided on the authority of Peters *v.* Warren Ins. Co., 14 Pet. 99.

[1] Thompson *v.* Reynolds, 7 Ellis & B. 172, 40 Eng. L. & Eq. 54. The policy in this case provided, that in case the ship should by accident or through the negligence of the master and crew, run down or damage any other ship, and the assured should pay any sum not exceeding the value of the ship and her freight, in pursuance of the judgment of a court or in pursuance of any award entered into by the assured with the concurrence of two of the directors of the company, the company should be liable for such proportion of three fourth parts of the sum so paid, as the amount insured should bear to the value of the ship insured and her freight. The ship was valued at 3,000*l.* in the policy. Having come into collision with another vessel, she was libelled, and a decree passed that she should pay 2,110*l.* This sum not being paid, the vessel was sold under a decree of the court, and the plaintiff claimed to recover the proportion for which the defendants were liable under the agreement, on the supposition that he had paid 3,000*l.*, but the court held the liability was to be proportioned to the sum which the plaintiff was actually obliged to pay, namely, 2,110*l.*

[2] See Vol. I. p. 399–406.

SECTION IV.

OF LOSSES FROM FIRE.

We have seen in the preceding volume,[1] that fire is not a peril of the sea, as between the shipper of goods and the ship-owner, and we presume the same rule would apply to a case of insurance; but the question is not a very important one, as fire is always specifically insured against. But the underwriters are not liable for a fire caused by the inherent defect or quality of the thing insured.[2] The insurers have been held liable, where a vessel was burned by the public authorities, through the fear of contagious diseases.[3] The ship may be burned purposely by the master, and yet the insurers be held responsible, if this burning were the only means of saving her from capture by a public enemy; for, in the first place, the burning is then a duty owed to the State; and, in the second, the insurers are not damaged, because, if not lost by fire, she would have been lost by capture; but if loss by capture is expressly excepted, it would seem, from some authorities, that the first reason would be enough.[4]

[1] Page 182, note.

[2] Boyd *v.* Dubois, 3 Camp. 133.

[3] Emerigon, c. 12, s. 17, § 2, Meredith's Ed. 348. See Pattison *v.* Mills, 1 Dow & C. 342, 2 Bligh, N. S. 519.

[4] Emerigon, c. 12, s. 17, Meredith's Ed. 350, Valin, vol. 2, 75, tit. Ins. a. 26, and Pothier, Ins. n. 53, all agree that in such a case the underwriters are liable, and it has been so held by Lord *Ellenborough*, in Gordon *v.* Rimmington, 1 Camp. 123. Mr. Weskett, in his work on Insurance, tit. Fire, n. 6, is, however, of the opinion, that unless the master was in danger of being killed by falling into the hands of the enemy, he would not be justified in setting fire to the ship, and the reason he gives is a strong one, and worthy of careful attention. It is this: "Because, although she were captured, there would still remain a chance of her being retaken, by cruisers of his own nation, or possibly by such part of her crew as might happen to be left on board of her." Mr. Phillips remarks that "this reason does not show that the insurers ought to be wholly exonerated from the loss; it only goes to show, at most, that what would be the net amount of the salvage, in case of recapture, ought to be deducted from the amount of a total loss, or else, that the insurers ought to be answerable only for the amount to which the recaptors would be entitled for recovering the property, supposing the loss, in such a case, to be adjusted as an average." But this is not an

From analogous decisions in cases of land insurance against fire, it might be inferred that if property were injured or rendered worthless by the effects of a fire, but without actual ignition of that property, the insurers would not be answerable. But the true principles of the Law of Marine Insurance would lead to the conclusion, that if these destructive effects are the direct and immediate effects of an actual fire, the insurers should be held. We think the law, as deduced from the cases, may be expressed thus: if there is no ignition, insurers are not liable for the extraordinary effects of an ordinary fire; but they are liable for the ordinary effects of an extraordinary fire.[1]

entirely satisfactory answer to the objections to the law, as laid down by Lord *Ellenborough*, although it may be to the reason of Mr. Weskett. This last applies to the case where the insurers are liable for capture; but where the vessel is insured free from capture, it is difficult to see why the underwriters should be liable for the wilful act of the agent of the insured, that act being done to avoid a peril for which they would not be responsible.

[1] The rule is generally laid down, that there must be ignition or actual combustion to enable the insured to recover for a loss by fire. 2 Marsh. Ins. 790. The case cited in support of this proposition, and the leading one on the subject, is Austin *v.* Drew, 4 Camp. 360, Holt, N. P. 126, 6 Taunt. 436, 2 Marsh. R. 130. The insurance was "against all the damage which the plaintiffs should suffer by fire" on their "stock and utensils in their sugar-house." The evidence showed, that the building was of eight stories, and in each story, sugar, in a certain state of preparation, was deposited for the purpose of being refined, and that for this purpose a certain degree of heat was necessary. To accomplish this, there was a chimney running up through the whole building, forming almost one side of the house, and by means of the chimney, heat was communicated to each story. At the top of the chimney was a register, which was shut at night, in order that the heat might be retained in the building. This register was, by the negligence of a servant, left shut one morning when the fires were lighted, and, consequently, the smoke and heat were forced into the room where the sugars were drying, and damaged them to a great extent. It was held, that the insurers were not liable. This case has been cited as an authority for many positions. The most accurate report of it is in 4 Camp. 360, where *Gibbs*, C. J., states the reasons for the decision, as follows: "In this case there was no fire, except in the stove and the flue, as there ought to have been, and the loss was occasioned by the confinement of heat. Had the fire been brought out of the flue, and any thing had been burnt, the company would have been liable. But can this be said, where the fire never was at all excessive, and was always confined within its proper limits? This is not a fire, within the meaning of the policy, nor a loss for which the company undertake. They might as well be sued for the damage done to drawing-room furniture by a smoky chimney." Mr. Justice *Cushing*, after a thorough analysis of this case, in Scripture *v.* Lowell Mut. F. Ins. Co., 10 Cush. 356, said: "This, therefore, and this only, as correctly stated by Beaumont (Ins. 37), is decided by the case of Austin *v.* Drew, namely, that where a chemist, artisan, or manufacturer, employs fire as a chemical agent, or as an instrument of art or fabrication, and the article which is thus purposely subjected to the action of

Probably, the rules prevailing in land policies against fire, that the insurers are liable for expenses incurred in arresting and pre-

fire, is damaged in the process by the unskilfulness of the operator, and his mismanagement of heat as an agent or instrument of manufacture, that is not a loss within a fire policy. This, we apprehend, is good sense and sound law." And the learned judge further remarks: "It may well happen that serious damage, within the scope of a fire policy shall be done to a building, or to its contents, by the action of fire in scorching paint, cracking pictures, glass, furniture, mantlepieces, and other objects, or heating and thus actually destroying many objects of commerce, and yet all this without actual ignition — that is, visible inflammation." This precise point, however, did not arise in the case. But in Case *v.* Hartford F. Ins. Co., 13 Ill. 676, it was expressly held, that the insurers were liable for the damage done in such a case.

It seems well settled, on principle and authority, that underwriters are not liable for damage done by lightning, where there is no ignition, lightning not being fire. Kenniston *v.* Mer. Co. Mut. Ins. Co., 14 N. H. 341; Babcock *v.* Montgomery Co. Mut. Ins. Co., 6 Barb. 637, 4 Comst. 326. Nor are they liable for damage done by the explosion of a steam-boiler. Millaudon *v.* N. O. Ins. Co., 4 La. Ann. 15. So, where it was provided by the conditions annexed to a policy of insurance against fire, that the company should not be liable "for any loss occasioned by the explosion of a steam-boiler, or explosions arising from any other cause, unless specifically specified in the policy," the company was held not liable, where fire, which was directly and wholly occasioned by an explosion, was the proximate cause of the loss. St. John *v.* Am. Mut. F. & M. Ins. Co., 1 Duer, 371, 1 Kern. 516. See also, Perrin *v.* Protection Ins. Co., 11 Ohio, 147; Montgomery *v.* Firemen's Ins. Co., 16 B. Mon. 427; Roe *v.* Columbus Ins. Co., 17 Mo. 301; McAllister *v.* Tenn. M. & F. Ins. Co., 17 Mo. 306.

But an explosion caused by gunpowder is a loss by fire. It was so held in Scripture *v.* Lowell Mut. F. Ins. Co., 10 Cush. 356, after a learned and elaborate review of the authorities. The explosion was caused by the son of the tenant of the house putting a match to a barrel of gunpowder. The question is thus stated by Mr. Justice *Cushing:* "By the ignition of gunpowder within a dwelling-house, damage is done to the house, that damage consisting in part of combustion, and in part of explosion. Is the *whole* damage covered by a policy insuring 'against loss or damage by fire?'" The court held that it was. The law is laid down, as follows: "In the present case, there is no room for question concerning a series of causes, as whether primary or secondary, proximate or remote; for the agent is one and the same throughout, namely, fire. The *causa* was burning powder; the *causa causans* was a burning match; at each stage of causation it was the action of fire. Nay, to be exact, the burning of the gunpowder, like the burning of the match, was a succession of several complex acts of burning. Yet fire is the agent at each of these distinct stages of causation. Suppose there was a barrel of sulphur in the plaintiff's attic, instead of gunpowder; and this being ignited with a match, afterwards the fire had passed from the burning sulphur to the substance of the house. This would be recognized at once, as a case of fire. It does not change the legal relation of causes, to substitute a barrel of burning gunpowder for a barrel of burning sulphur. The only difference in the elements of the question is, that the gunpowder, when ignited, consumes with more rapidity than sulphur, and the combustion is accompanied or followed by explosion. Still, the agent is fire, though it acts in different ways upon the different successive subjects of its action, beginning with the match and terminating with the plaintiff's house." On page 363, the court said their

venting fire,[1] and, to some extent — it may be uncertain how far — for injury sustained from such endeavors,[2] as where goods

opinion excluded "all damage by mere explosions, not involving ignition and combustion of the agent of explosion, such as the case of steam, or any other substance acting by expansion without combustion." But on page 364, several cases are stated as seeming to fall within the general rule of holding the insurers liable, where an explosion takes place without combustion, which is, nevertheless, the result of the action of fire, which would seem to render them liable for damage caused by the explosion of a steam-boiler. For other cases of explosion by gun-powder, see Waters *v.* Merchants' Louisville Ins. Co., 11 Pet. 213, 225; Grim *v.* Phœnix Co., 13 Johns. 451.

[1] Thus, if a building is blown up with gunpowder by the public authorities, in order to stop a conflagration, the underwriters against fire are liable. City F. Ins. Co. *v.* Corlies, 21 Wend. 367; Phillips *v.* Protection Ins. Co., 14 Mo. 220; Pentz *v.* Receivers of Etna F. Ins. Co., 9 Paige, 568, 3 Edw. Ch. 341. In Welles *v.* Boston Ins. Co., 6 Pick. 182, blankets were put upon a building by the insured with the approbation of the insurer, while a fire was raging in the neighborhood, and the building and its contents were thereby saved from destruction, but the blankets were rendered worthless. The insured, the owner of the goods, paid for the blankets, and brought this action against his insurers. The latter admitted their liability for a part of the amount estimated upon the proportion they had at risk upon the policy, taken in connection with the store, of which the plaintiff had a lease for a term of years, and the value of the stock, over and above the sum insured upon it. And the court held that the underwriters were not liable for the whole value of the blankets, but only in the proportion named, and that the owners of other buildings, which were perhaps saved by the use of the blankets, were not obliged to contribute.

[2] It is not yet quite settled on the authorities, how far the insurers are liable for goods damaged or lost while being moved from a building, through apprehension of its being burned by a conflagration then raging, and for the expense of so moving them. In Pennsylvania, it was held that they were not liable, where the fire at the time was four houses off. Hillier *v.* Allegheny Ins. Co., 3 Barr, 470. In Case *v.* Hartf. F. Ins. Co., 13 Ill. 676, the policy contained the following clause: "In case of fire or loss or damage thereby, or of exposure to loss or damage thereby, it shall be the duty of the insured to use all possible diligence in saving and preserving the property; and if they shall fail to do so, this company shall not be held responsible to make good the loss and damage sustained in consequence of such neglect." The store of the plaintiff, though not on fire, was in immediate danger of catching, and the circumstances were such that a neglect to remove the goods would have been gross negligence on his part. It was held that he was entitled to recover for all damage done, and expenses incurred. And the existence of such a clause does not seem to impose any greater obligations on the assured, than would exist without it. Firem. Ins. Co. *v.* May, 20 Ohio, 211. It seems very clear, that if the house should be burnt after the goods were taken out, the insurers would be liable for all damage done and expenses incurred, and there is no sound reason why the same rule should not apply, where the danger was such as to excite apprehension in the mind of a man of ordinary prudence. See Beaumont on Ins. 41. In Webb *v.* Protection Ins. Co., 14 Mo. 3, the policy contained a clause exempting the company from loss by theft; or any loss or damage by fire which might happen in case of an invasion, insurrection, or riot, &c. It was held, that the two clauses were independent of each other, and that the company were not liable for a loss

are hurt by water from the engines,[1] would apply to marine insurance against fire; always, however, with the proviso, that the insurers are not to be held responsible for losses not specifically insured against, unless they are the direct and immediate effects or consequences of a peril which is insured against.

The risk does not cease on the ship or furniture, if during the voyage, any part of it is taken on shore in the ordinary course of events.[2] But this rule does not apply to cargo which is taken on shore, for the purposes of barter.[3]

by theft, in case goods were removed to protect them from an ordinary fire, although the court were of opinion, that ordinarily the insurers would be liable for such a loss. In Agnew *v.* Insurance Co., Dist. Ct. Philadelphia, 7 Am. Law Reg. 168, the underwriter was held liable for a loss by theft, where the goods had been removed. See also, Babcock *v.* Montgomery Co. Mut. Ins. Co., 6 Barb. 637, 640, per *Pratt*, J.

[1] In Case *v.* Hartford F. Ins. Co., 13 Ill. 676, 680, *Turnbull*, J., said: "Surely an injury to the goods by water thrown to extinguish a fire, would not be an injury to the goods by actual ignition, and yet no case can be found, where an insurance against damage by fire, has been held, not to extend to such a case." See also, Hillier *v.* Allegheny Co. Mut. Ins. Co., 3 Barr, 470, per *Grier*, J.; Agnew *v.* Insurance Co. Dist. Ct., Philadelphia, 7 Am. Law Register, 168; Babcock *v.* Montgomery Co. Mut. Ins. Co., 6 Barb. 637, per *Pratt*, J.; Scripture *v.* Lowell Mut. F. Ins. Co., 10 Cush. 356, 365, per *Cushing*, J. In Nimick *v.* Holmes, 25 Penn. State, 366, it was held, that where a vessel or its cargo takes fire without the fault of the crew, the damage done by the application of water or steam for the purpose of extinguishing the flames, and by tearing up part of the deck of the vessel, should be contributed for in general average. But there seems to be no reason why the insurer against fire should not be liable in such a case.

[2] In Pelly *v.* Royal Exch. Ass. Co., 1 Burr, 341, during the voyage, in accordance with a usage of trade, the sails were taken on shore while the vessel was being repaired, and were burnt, and it was held that the insurers were liable. So, in Brough *v.* Whitmore, 4 T. R. 406, where provisions were lost under similar circumstances, the underwriter was held liable.

[3] In Martin *v.* Salem Mar. Ins. Co., 2 Mass. 420, a vessel and cargo were insured "from Marblehead to one or more ports in the West Indies, for the purpose of selling the outward and purchasing a return cargo, and at and from thence to Marblehead." The outward cargo was landed and sold, and the proceeds, in the form of specie, with which the homeward cargo was to be bought, were in the hands of the factor there, according to the usage of the trade, when the house was burnt and most of the specie lost. Held, the risk did not continue after the goods were landed. In Harrison *v.* Ellis, 7 Ellis & B. 465, a vessel and cargo were insured. The risk on the cargo was to continue till it should be discharged and safely landed. The policy also contained the memorandum: "with liberty to load, reload, exchange, sell, or barter, all or either, goods or property on the coast of Africa and African islands, and with any vessels, boats, factories, and canoes, and to transfer interest from this vessel to any other vessel, or from any other vessels to this vessel, in port or at sea, and at any ports or places

SECTION V.

OF LOSS BY PIRATES, ROBBERS, OR THIEVES.

The usual insurance against these risks, renders the insurers liable for losses or damage arising from all such acts as amount to piracy or robbery; even, it is said, if they are committed by the crew, provided due care and diligence have been used to prevent them; as if there be a mutiny of the crew.[1] To bring a loss

she might call at or proceed to, without being deemed a deviation." It was held, that the underwriters were not liable for a loss occasioned, while part of the cargo was in a factory on the coast, and the vessel was engaged in loading native produce, by the factory and its contents being burned.

[1] It is so stated by Chancellor *Kent*, 3 Comm. 303, citing Brown *v.* Smith, 1 Dow, 349. Mr. *Phillips* says, citing the same case: "Under the risk of pirates and rovers, or under perils of the seas, the insurers are liable for losses by a mutiny of the crew." 1 Phillips, Ins. § 1106. Mr. *Arnould*, 2 Vol. Ins. 817, says it *seems* the underwriters are liable in such a case, citing the same case, and adding: "In Dixon *v.* Reid, 5 B. & Ald. 597, such a loss was laid as loss by barratry, which seems the true mode of alleging it." An examination of the case of Brown *v.* Smith, will show, as we think, that this question did not, and could not arise. The insurance was against "barratry of the masters and mariners and all other perils, losses and misfortunes, that have, or shall come to the hurt, detriment, or damage of the said goods and merchandise and ship or any part thereof." It has not, therefore, been decided that mutiny is a piratical act. In Naylor *v.* Palmer, 8 Exch. 739, 22 Eng. L. & Eq. 573, insurance was effected on advances for the outfits, provisions, etc., of coolies, to be repaid upon the safe delivery of the emigrants at the port of destination in Peru. The insurance was against pirates, thieves, and all other the usual perils. On the voyage the coolies rose upon the crew, murdered part of them and the captain, took the ship, and sailed for land; on reaching which they left the ship and escaped. *Pollock*, C. B., said: "The act of seizure of the ship, and taking it out of the possession of the master and crew, by the passengers, was either an act of piracy and theft, and so within the express words of the policy, or, if not of that quality, because it was not done *animo furandi*, it was a seizure *ejusdem generis*, analogous to it, or to barratry of the crew, falling within the general concluding words of the perils enumerated by the policy." The case was affirmed in the Exchequer Chamber, Palmer *v.* Naylor, 10 Exch. 382, 26 Eng. L. & Eq. 455. In the case of McCargo *v.* New Orleans Ins. Co., 10 Rob. La. 202, where a cargo of slaves rose and took possession of the vessel, it was contended that the underwriters were liable on the ground that the act was a piratical one. The point was not determined by the court, the underwriters being discharged by reason of insurrection being excepted against.

In Nesbitt *v.* Lushington, 4 T. R. 783, where a vessel laden with corn was forced by stress of weather into a harbor in Ireland, and a mob came on board, took the

within the words of this clause, there must be violence, for without this there can be neither piracy nor robbery. But there may be theft without violence; and whether a loss by such theft would come within this clause, is not certain from the decisions. But the weight of American authority, upon the whole, would lead to the conclusion that insurance against "theft," or against "thieves," would make the insurers liable for a loss by larceny.[1]

command of the ship, and weighed anchor, by which the vessel was driven on a reef of rocks where part of the cargo was lost, and the rest the mob compelled the captain to sell to them at about three fourths of the invoice price, Lord *Kenyon* expressed an opinion that there might have been a recovery as for a loss by pirates, if the corn had not been insured against particular average. See also, generally, Dean *v.* Hornby, 3 Ellis & B. 180, 24 Eng. L. & Eq. 85.

[1] It is laid down in all the early text-writers and authorities, that an insurer is not liable for losses by theft on board the vessel, on the ground that the master of the vessel is bound to take all the care of the goods in his power, and when they are stolen while in the vessel, it is considered as proceeding from negligent custody and not from accident. Roccus, note 42; Emerigon, c. 12, § 29, Meredith's Ed. p. 419. In this country, Chancellor *Kent* has followed the authorities above cited, 3 Comm. 303, and has been sustained by a decision in Tennessee, Marshall *v.* Nashville Ins. Co., 1 Humph. 99, where part of the goods were alleged to be stolen by persons connected with the boat on which they were shipped, and it was held on demurrer that the assured could not recover. In New York, on the other hand, the underwriters were held liable for a loss by simple larceny, while the boat was at a wharf. Atlantic Ins. Co. *v.* Storrow, 5 Paige, 285. And in Am. Ins. Co. *v.* Bryan, 1 Hill, 25, 26 Wend. 563, it was held, both by the Supreme Court and by the Court of Errors, after most elaborate arguments, that the word theft did not necessarily mean only a stealing by violence, but would also include a simple larceny. The goods had been stolen while the vessel was on the voyage, but it could not be shown by whom, whether by a passenger or by one of the crew.

In England, Mr. *Arnould* says of this case: "In this country it cannot be considered law." 2 Arnould, Ins. 818. In this assertion he is supported by all the early text writers. Mr. *Park* says: "But that the underwriter is liable for a robbery of the goods insured, when committed by thieves from *without*, cannot be doubted; as thieves are a peril expressly insured by the policy." Park, Ins. 31, citing Harford *v.* Maynard, before Lord *Mansfield*, 1785. In De Rothschild *v.* Royal Mail Steam Packet Co., 7 Exch. 734, 14 Eng. L. & Eq. 327, eleven boxes of gold dust were delivered to the defendants at Panama to be delivered at the Bank of England. The bill of lading contained the following exceptions: "the act of God, the queen's enemies, pirates, robbers, fire, accidents from machinery, boilers, and steam, the dangers of the seas, roads and rivers of whatever nature or kind soever excepted." The boxes arrived in safety at Southampton, but in the course of their transmission to London by railway, one of the boxes was stolen without violence. The jury found that the defendants were guilty of negligence in the conveyance of the boxes to London, and that this negligence caused the loss. The defendants pleaded that they were exempted by reason of the exceptions of loss from "robbers," and "dangers of the roads." Judgment was given for the plaintiffs on grounds which would seem to modify to some

To avoid this conclusion, the phrase, "assailing thieves," is sometimes used; and this no doubt covers only theft, *ab extra*, with violence. And even if robbery or theft is not insured against, but loss occurs by them in consequence of an exposure to theft by shipwreck, or as the direct and immediate effect of any peril insured against, the insurers would be held liable for this.[1]

extent the rule as previously laid down by the English authorities. *Pollock*, C. B., said: "In construing such instruments, it was contended that the ordinary meaning of the words used must be followed. We think that position is correct, but we must also look at the circumstances under which the contract was made, and the peculiar subject to which it applied; and taking these into consideration, we cannot doubt that the meaning of the contract was, that the defendants were not to be liable for the loss of the gold dust in instances where it was taken by force, by a *vis major* which they, the defendants, could not resist, but that they were to be liable where it was pilfered from them, or taken by stealth. It is very unreasonable to suppose that the shippers of a very precious article, of which a large value is comprised in a very small space, which is capable of being easily abstracted by any person employed in carrying it, meant to exempt the persons to whom they gave the custody and care of it from all responsibility for theft committed by their crew, or others, against whom, presumably, they could guard by the exercise of reasonable care; but it is likely that they should agree to exempt them where the goods were taken by a force which they could not resist. The nature of the transaction shows clearly, therefore, that the word 'robbers' means, not 'thieves,' but robbers by force, to whom the term is more usually applied, although in common parlance, it is often applied to every description of theft. It is explained also, by the word with which it is associated, 'pirates,' who certainly take by force and not by stealth. We have no doubt, therefore, in this bill of lading, that this is the proper meaning of the word 'robbers,' and this being so, the loss in this case was not by robbers."

[1] Bondrett *v.* Hentigg, Holt, N. P. 149. The goods, in this case, were plundered after they were saved from the wreck, but before they came into the hands of the owners. Pothier, n. 55, says: "The loss of effects insured happening through pillage, in case of shipwreck, by wreckers and others, on the shore on which the waves have cast them, is a peril of the sea, to be borne by the insurers." Emerigon adopts this decision, c. 12, s. 29, Meredith's Ed. 419.

In two old cases it is held that a loss by piracy is a loss by a peril of the sea, though piracy be not specifically insured against. Pickering *v.* Barclay, 2 Roll. Ab. 248, pl. 10; Barton *v.* Wolliford, Comb. 56. See Santerna De Ass. part 3, n. 61–65; Straccha, Glossa. 22, *passim*, where this question is discussed.

SECTION VI.

OF LOSS BY BARRATRY.

What barratry is has been much disputed, and may not be yet quite settled; but we hold it to be any wrongful act of the master, officers, or crew, done against the owner.[1] And any one who has an interest in the ship, cargo, or freight, may insure that interest against barratry.[2]

If an unlawful act be done without intention, or through inadvertence or ignorance, it is not barratry.[3] The act must be wrongful in itself, and wrongfully intended; for if it be done in compliance with the owner's instructions or request, or with his assent, it is not barratry, even as against others who are injured by it.[4] But it need not be done with an intention adverse to

[1] Considerable discussion has arisen in regard to the meaning of this word. In very many of the cases it is defined to be a fraud, cheat, or trick on the part of the captain against the interest of the owners. See Knight *v.* Cambridge, 1 Stra. 581, 8 Mod. 230, 2 Ld. Raym. 1349; Phyn *v.* Royal Exch. Ass. Co., 7 T. R. 505; Stamma *v.* Brown, 2 Stra. 1173; Lockyer *v.* Offley, 1 T. R. 252; Vallejo *v.* Wheeler, Cowp. 143; Wilcocks *v.* Union Ins. Co., 2 Binn. 574; Earle *v.* Rowcroft, 8 East, 126; Wiggin *v.* Amory, 14 Mass. 1; Stone *v.* National Ins. Co., 19 Pick. 34; Crousillat *v.* Ball, 4 Dallas, 294. In Patapsco Ins. Co. *v.* Coulter, 3 Pet. 222, many of these cases were examined by Mr. Justice *Johnson*, and the points on which they turned were shown not to warrant the language used. The learned judge seemed to prefer the very excellent definition given by Emerigon, which he translated, "acting without due fidelity to the owners."

[2] Stone *v.* National Ins. Co., 19 Pick. 34. The mate in this case insured his adventure against barratry of the master and mariners, and recovered for a loss occasioned by the theft of the crew.

[3] As the unintended violation of a blockade. Dederer *v.* Delaware Ins. Co., 2 Wash. C. C. 61. In one case, a vessel having sprung a leak, the captain put into port, and before a survey broke up her ceiling and end bows with crowbars, in consequence of which the ship was much injured and weakened. It was suggested that this was done to procure the condemnation of the vessel. Lord *Ellenborough* said: "In order to constitute barratry, which is a crime, the captain must be proved to have acted against his better judgment; as the case now stands, there is a whole ocean between you and barratry." Todd *v.* Ritchie, 1 Stark. 240. And if a neutral vessel is captured and sent in for condemnation, and the crew desert, such desertion is not barratry on their part. Messonier *v.* Union Ins. Co., 1 Nott & M'C. 155.

[4] Nutt *v.* Bourdieu, 1 T. R. 323. In Thurston *v.* Col. Ins. Co., 3 Caines, 89, it

the owner; for if the master or mariners violate any law in the belief that it will be for the owner's advantage, but without his instruction or request, this is barratry, because such an act is wrongful, against the owner, inasmuch as the master had no right to infer that the owner would desire or assent to a violation of law, even if it might be for his benefit.[1] Generally, however, if an act is done for the benefit of the owners, although through a mistaken idea on the part of the master, it is not barratry.[2] But if a master undergoes any extraordinary and evitable peril, from no necessity whatever, but in the belief that it might be advantageous to his owner, a loss arising from this risk would be a loss by barratry. So if the act were done by the master for his private and personal benefit.[3] And the extreme violation of duty or gross negligence might be barratrous, although committed without fraud or intentional wrong, and with no purpose of personal gain, and with no desire to injure any one.[4] And it is said that mere nonfeasance, as not

was held that if an assured be apprised by his master of his pursuing another voyage than that insured, and do not disapprove of it, it is only a deviation and not barratry, though the master ultimately runs away with the ship, sells her and embezzles the proceeds. See also, Ward *v.* Wood, 13 Mass. 539; Everth *v.* Hannam, 6 Taunt. 375.

[1] Earle *v.* Rowcroft, 8 East, 126.

[2] In Dederer *v.* Delaware Ins. Co., 2 Wash. C. C. 61, an American vessel was captured by an English frigate on the ground that war had been, or soon would be declared between the countries to which the vessels respectively belonged. The captain, apprehending the loss of the vessel, and all he had on board, and that he would be imprisoned, made an attempt to rescue the vessel, and failed. This attempt was the cause of the condemnation. The court held that if he acted for the benefit of his owners, his act would not be barratrous, otherwise if he acted for his own good exclusively. See also, Crousillat *v.* Ball, 4 Dall. 294; Hood *v.* Nesbitt, 2 Dall. 137, 1 Yeates, 114, a deviation to rescue a vessel which had been run away with, was held not to be barratrous; the captain intending to give the reward to his owners. See also, Elton *v.* Brogden, 2 Stra. 1264.

[3] As where the captain deviated for a private purpose of his own. Ross *v.* Hunter, 4 T. R. 33; Vallejo *v.* Wheeler, Cowp. 143, Lofft, 631. See Dederer *v.* Delaware Ins. Co., 2 Wash. C. C. 61, note 2, ante; Roscow *v.* Corson, 8 Taunt. 684. In Kendrick *v.* Delafield, 2 Caines, 67, it was held that if a loss is shown to have taken place by the fraudulent act of the master, the presumption is that he did it for his own benefit, and in the absence of proof to the contrary, the plaintiff may recover, although the act was the boring of holes in the vessel.

[4] In Heyman *v.* Parish, 2 Camp. 149, the pilot testified that the captain sailed with a foul wind, contrary to his directions, and that the ship having been stopped when going on shore by getting out an anchor, the captain cut the cable and allowed her to

resisting or preventing an injury to the property when this might have been done, may be barratrous.[1] And barratry has been extended so far as to apply to all carriers by land as well as by water.[2] If the policy excepts, or if the insured warrants against barratry, it would probably be construed only as an

drift upon the rocks. *Park*, for the defendant, suggested that there did not appear to be any fraud. Lord *Ellenborough* said: "This is not necessary. It has been solemnly decided, that a gross malversation by the captain in his office is barratrous," referring to Earle *v.* Rowcroft, 8 East, 126. So "if the master, knowing the inevitable danger of capture if he proceed on his voyage, should, notwithstanding, continue it, and expose the vessel to certain seizure, this will be a loss, not arising from the perils insured against, but from a criminal breach of the duty he owes to his owners, which is barratry." Per *Parsons*, C. J., in Richardson *v.* Maine F. & M. Ins. Co., 6 Mass. 102, 117, 121. So barratrously carrying a cargo into a blockaded port. Goldschmidt *v.* Whitmore, 3 Taunt. 508; Calhoun *v.* Ins. Co. of Penn., 1 Binn. 293, 321. See Vos *v.* United Ins. Co., 2 Johns. Cas. 180. And cruising and taking a prize contrary to instructions is barratry, although the captain libelled the prize for the benefit of his owner as well as himself. Moss *v.* Byrom, 6 T. R. 379. But see Wiggin *v.* Amory, 14 Mass. 1. Collusion by the captain to have his ship captured, is barratry. Arcangelo *v.* Thompson, 2 Camp. 620. So, if the ship and cargo are taken out of their course and fraudulently sold. Dixon *v.* Reid, 5 B. & Ald. 597, 1 D. & R. 207; Jones *v.* Nicholson, 10 Exch. 28, 26 Eng. L. & Eq. 542. Or wilfully running the ship on shore without necessity. Soares *v.* Thornton, 7 Taunt. 627. But if a master should run the vessel on shore, or cut away his masts, with a *bonâ fide* intention of saving the ship and cargo, this would not be an act of barratry, although it should turn out that the sacrifice need not have been made. Smuggling is barratry. Vallejo *v.* Wheeler, Cowp. 143; Am. Ins. Co. *v.* Dunham, 12 Wend. 463, 15 id. 9; Mariatigui *v.* Louisiana Ins. Co., 8 La. 65; Lockyer *v.* Offley, 1 T. R. 252. In Brown *v.* Union Ins. Co., 5 Day, 1, resistance to search, and rescuing and retaking a vessel, were held to be barratrous acts. See also, Wilcocks *v.* Union Ins. Co., 2 Binn. 574. So, if the captain should sail out of port without leave, in breach of an embargo, in consequence of which the owners afterwards sustained a loss, in respect of seaman's wages and provisions, by the detention of the ship, such an act would probably be held to be barratrous. Per Lord *Ellenborough*, C. J., in Earle *v.* Rowcroft, 8 East, 126, 138, citing Robertson *v.* Ewer, 1 T. R. 127.

[1] In Patapsco Ins. Co. *v.* Coulter, 3 Pet. 222, 234, Mr. Justice *Johnson* said: "Certainly a master of a vessel who sees another engaged in the act of scuttling or firing his ship, and will not rise from his berth to prevent it, is *primâ facie* chargeable with barratry. Although a mere misfeasance, it is a breach of trust, a fault, an act of infidelity to his owners. So, if in (the) height of a storm, the captain and crew turn in without resorting to the nautical precautions of laying the vessel to, and otherwise preparing her to overcome the peril, it will be left to a jury to determine if such conduct be not barratrous." And a neglect to pay port duties before the ship sailed, has been held to be barratry. See Knight *v.* Cambridge, 1 Stra. 581, 8 Mod. 230, 2 Ld. Raym. 1349. In the different reports of this case, the nature of the barratrous act is not stated; but in Vallejo *v.* Wheeler, Cowp. 143, it is said to have been the neglect to pay duties.

[2] Boehm *v.* Combe, 2 M. & S. 172.

assuming by the insured of the risk of barratry; if, therefore, an act of barratry took place, the insurers would not be liable; but they would not be discharged from further responsibility, because the warranty against barratry would be held to mean only that the insured could make no claim because of it.

A deviation may not be barratrous, and generally is not;[1] but if the deviation be barratrous, and the insurers insure against barratry, then the act operates not as a deviation but as barratry. That is, the insurers would be liable for a loss caused by it; and would also be liable for a subsequent and independent loss; because this deviation, being an act of barratry and so insured against, would not discharge them.[2]

A stipulation, that the underwriters shall not be liable for seizure or detention on account of illicit or prohibited trade, does not render them less responsible for a seizure occasioned by barratry.[3] So also, as to a warranty of neutrality.[4]

It is said, that a barratrous act must be done without the owner's assent; and this rule extends to all quasi owners, or to those who have the vessel for the time under their control and govern-

[1] Phyn *v.* Royal Exch. Ass. Co., 7 T. R. 505; Thurston *v.* Col. Ins. Co., 3 Caines, 89; Wiggin *v.* Amory, 14 Mass. 1. So, where the captain deviated by reason of a misunderstanding of his instructions. Bottomley *v.* Bovill, 5 B. & C. 210, 7 D. & R. 702. In Stamma *v.* Brown, 2 Stra. 1173, the vessel was advertised to be going to Marseilles, and a bill of lading, signed by the master to go there direct, was given to the plaintiff, who thereon insured his goods. Before the ship sailed she was advertised to go to Genoa, Leghorn, and Naples, and the plaintiff's agent was told that it was intended to go to these ports first, and then to come back to Marseilles. He however insisted that the vessel should go direct. The chief justice charged the jury that this being against the express agreement to go first to Marseilles, seemed to be more than a common deviation, being a formed design to deceive the contractor, but on the jury asking whether, if the master was to have no benefit by his act, but went only to the other ports first for the benefit of the owners, that would be barratry, the chief justice said no, and a verdict was found for the defendant. It is not barratry for the master to omit to make practicable repairs, or to transship the cargo, unless in so acting his purpose was to injure his owners. Stewart *v.* Tennessee M. & F. Ins. Co., 1 Humph. 242.

[2] See ante, p. 240, n. 3.

[3] Am. Ins. Co. *v.* Dunham, 12 Wend. 463, 15 id. 9; Suckley *v.* Delafield, 2 Caines, 222; Calhoun *v.* Ins. Co. of Penn., 1 Binn. 293.

[4] Wilcocks *v.* Union Ins. Co., 2 Binn. 574, 579; Brown *v.* Union Ins. Co., 5 Day, 1. And where the ship was insured in any lawful trade, it was held, that the underwriters were liable for a loss which happened by the barratry of the master by smuggling, the words "lawful trade," being considered to mean the trade in which the ship was sent by the owners. Havelock *v.* Hancill, 3 T. R. 277.

ment as owners usually have. And if owners, or quasi owners, are themselves in default, in not preventing an act which would be barratrous, this is equivalent to their assent.[1] So, if the master is the sole owner of the ship, he cannot commit barratry against other parties in interest as shippers of goods,[2] or as charterers.[3] But it seems, that a captain who is a part-owner, may commit barratry against his other part-owners, and also against a charterer.[4]

If the insurer wishes to avail himself of the fact that the owner was master, he must prove it; and it is not necessary for the insured to prove negatively, that he was not the owner.[5]

If the master has an equitable title to the vessel, he cannot commit barratry.[6] But a fraudulent title will not prevent his acts from being barratrous.[7] Nor can the master commit barra-

[1] Pipon *v.* Cope, 1 Camp. 434.

[2] Taggard *v.* Loring, 16 Mass. 336; Lewen *v.* Suasso, Postleth. Dict. art. Assurance, 147; Barry *v.* La. Ins. Co., 11 Mart. La. 630.

[3] Marcardier *v.* Chesapeake Ins. Co., 8 Cranch, 39.

[4] Jones *v.* Nicholson, 10 Exch. 28, 26 Eng. L. & Eq. 542. The vessel in this case, was owned by two brothers, one of whom sailed as captain. A charter-party was entered into with the defendant, and the goods shipped in pursuance thereof were insured by the plaintiff. The captain ran away with the vessel and goods, and the plaintiff paid the loss, on the supposition that the vessel had been lost at sea, but on ascertaining the facts in the case, brought an action against the charterer to recover back the money paid, on the ground that he was not liable for the barratry of the master, he being an owner, but the court held, that the action could not be maintained. *Alderson*, B., said, that "a sole owner cannot commit barratry, but a part-owner may. If it be not barratry, it may be within the other words of the policy." *Platt*, B., said: "The loss was consequent on an act of knavery by the captain; and is not that a fraud upon the other owners, who have separate rights to their several shares?" *Martin*, B., was of opinion, that the loss was within the general terms of the policy. The question came up in Scotland, in 1839, in the case of Strong *v.* Martin, 1 Dunl. Bell, & Mur. Sess. Cas. 1245. The vessel was owned by two persons as part-owners. One of them acted as captain and committed the alleged act of barratry. The court having desired the opinion of English counsel, that of Sir William Follett was obtained, and in accordance therewith, the innocent part-owner was held entitled to recover to the amount of his interest.

[5] Ross *v.* Hunter, 4 T. R. 33; Steinbach *v.* Ogden, 3 Caines, 1; Barry *v.* La. Ins. Co., 11 Mart. La. 202.

[6] Barry *v.* La. Ins. Co., 11 Mart. La. 630.

[7] Steinbach *v.* Ogden, 3 Caines, 1. In this case, the master ran away with the vessel, procured a fraudulent survey and sale, and became the purchaser. He then entered into a contract of affreightment with the plaintiff, who acted in good faith, and had the goods insured by the defendant. The captain barratrously disposed of these goods, and the insurer was held liable.

try, except as master, and no acts of his as supercargo, consignee, or factor, would be barratrous.[1] But if the owner of the ship be insured, the consent or request of the charterer to the act committed by the master, will not prevent it from being barratrous;[2] and, on the other hand, if a charterer of a ship, sails her and becomes a quasi owner, the master, however, being appointed by the owner, an act by the master which would otherwise be barratrous against the charterer, is not prevented from being so, by the assent or request of the owner.[3]

As the master is, for many purposes, the agent of the owner, and is appointed by him, many policies provide that they do not insure against barratry, if the insured be owner of the ship.[4] Such a provision, of course, generally limits the insurance against barratry to a loss or damage to the cargo, and to such cargo

[1] Emerigon, c. 12, s. 3, Meredith's Ed. 296. But, if the act is done by the master in his capacity of master, although he may fill other offices, it will be barratry. Kendrick *v.* Delafield, 2 Caines, 67. In Cook *v.* Comm. Ins. Co., 11 Johns. 40, the ship and cargo were owned by the same person. The master was, also, supercargo and consignee, and the barratrous act complained of, was the conversion of part of the cargo to his own use, after the vessel had arrived at her port of destination. The underwriters were held liable, it being considered that the breach of duty was imputable to him as master. See also, on this point, Earle *v.* Rowcroft, 8 East, 126, 140.

[2] Boutflower *v.* Wilmer, 2 Selw. N. P. 969; M'Intire *v.* Bowne, 1 Johns. 229.

[3] Vallejo *v.* Wheeler, Cowp. 143, Lofft, 631, 1 Johns. 235, note; Soares *v.* Thornton, 7 Taunt. 627. We have considered in our previous volume, in what cases the captain will be considered the agent of the general owners, and when of the special. In a case before Lord *Ellenborough*, Hobbs *v.* Hannam, 3 Camp. 93, it was held, that where a ship was chartered and the general owner insured his interest, the underwriters were not liable to him for a barratrous act of the master appointed by the charterer. It has also been decided, that if the charterer sails the vessel as captain, he cannot commit an act of barratry against a shipper of goods. Hallet *v.* Col. Ins. Co., 8 Johns. 272; Taggard *v.* Loring, 16 Mass. 336.

[4] In Paradise *v.* Sun Mut. Ins. Co., 6 La. Ann. 596, there was insurance against barratry of the master, unless the insured were owner of the vessel. The plaintiffs effected an insurance on the freight, which the owner of the vessel had assigned to them as security for advances, in their own names, for the benefit of whom it might concern. It was alleged, that the insurance was effected for their benefit to the amount of their claim, and for the owner for the surplus. The court held that, admitting this to be true, yet the policy being indivisible, and the barratry of the master being a good defence against one of the parties interested, it was good against all. And they were also of the opinion, that all the evidence construed together justified the conclusion, that the policy was intended to cover the owner's interest, and to be held by the assured as security under an assignment, and that the owner was therefore to be regarded as the assured, and the nominal assured as assignees merely, taking only the rights which the owner possessed, and liable for the barratrous acts of the master.

only as is shipped by a party who is not an owner of the ship.[1] And the intention is, not to insure an owner against the misconduct of a person selected and appointed by himself. But, if one who hired by charter the whole burden of the ship, put on board his own goods, and received goods on board of other persons, and insured his interest in the freight, this provision or exclusion would not prevent his recovering from the insurers, indemnity for a loss caused by the barratry of the master.

The owner and his master, are always required to guard, with all diligence, against the misconduct of the crew; and for their misdeeds, if such diligence be wanting, the insurers are not liable;[2] but where all proper care and diligence are used, the insurers are then responsible for losses caused by the barratrous acts of any of the officers or crew.[3] And insurance against the

[1] Brown *v.* Union Ins. Co., 5 Day, 1.

[2] Pipon *v.* Cope, 1 Camp. 434.

[3] The case of Elton *v.* Brogden, 2 Stra. 1264, is an important one on this point, and has been the subject of much criticism. The vessel was insured from Bristol to Newfoundland with a letter of marque. On the way she took a prize, and returned to England. Another policy was then made out and the ship sailed with express orders from the owners, that if another prize was taken it should be sent back, but that the vessel should proceed on her voyage. Another prize was taken, and the captain gave orders to some of his crew to carry it to Bristol, intending to proceed to Newfoundland in his own vessel, but the crew compelled him to submit and return, and on the way his vessel was captured. The defence was that the insurers were discharged, on the ground of a deviation, but the court held, that this was excused by the force upon the master and therefore was justified on the ground of necessity. The report then goes on to say: "The plaintiff's counsel would have made barratry of it, but the chief justice thought it did not amount to that, as the ship was not run away with in order to defraud the owners." In an appeal from the East Indies, heard before the Lords of the Privy Council at the Cockpit, Sir *R. P. Arden*, Master of the Rolls, in observing upon the above case, said he thought it must be ill reported in Strange, for, upon the facts stated, there could be no doubt but that the mariners had committed barratry, and he was inclined to think that the policy must have been special, and did not include barratry of the mariners. De Frise *v.* Stephens, 2 Marsh. Ins. 521, note, Park, Ins. 116, note. Such seems also to have been the opinion of Lord *Mansfield* in Vallejo *v.* Wheeler, Cowp. 143. In Scott *v.* Thompson, 4 B. & P. 181, 186, Sir James *Mansfield*, C. J., was of the opinion, that the act of the crew did not amount to barratry. Mr. Park says, that the policy could hardly have been a special one, as it would then have been absurd for the plaintiff's counsel to have argued that it was barratrous. And, we may further remark, that if the policy was special, not insuring against barratry, and "defendant's counsel" be inserted in the place of "plaintiff's counsel," the decision then would be, that the act of the crew was not barratrous, being done for the benefit of the owners, as is stated in the report, for we take the law to be, that if there is no insurance against

barratry of the master and crew, includes larcenies and embezzlements of the goods insured, by either the master or any of the crew, excepting only petty thefts and the like.[1]

In a case where it was alleged that the captain barratrously returned to port, procured the condemnation of the ship, and sold her and afterwards delivered her up to the purchasers, and the condemnation was more than six years before the commencement of the action, but the sale and delivery were within the six years, Lord *Ellenborough* was of the opinion, that the cause of action did not accrue till the master had divested himself of the possession of the ship, by delivering her up to the purchasers.[2]

SECTION VII.

OF LOSS BY CAPTURE, ARREST, DETENTION, OR RESTRAINT.

The usual phrase is, "against all captures at sea, or arrests, restraints or detentions, of all kings, princes, and people." This covers captures, detentions, or arrests by public enemies,[3] by belligerents,[4] or by the government of which the assured is himself

barratry, the underwriters are not liable for a deviation caused by barratry. So that, whether the policy were special or not, we think, can make no difference.

In Toulmin *v.* Anderson, 1 Taunt. 227, the crew, aided by some prisoners of war on board, rose, seized the ship and run her ashore. It was held, that the plaintiff would have been entitled to recover on these facts, on the ground of barratry, but the voyage being illegal, the plaintiffs were nonsuited. See Toulmin *v.* Inglis, 1 Camp. 421; Brown *v.* Smith, 1 Dow, 349.

[1] Am. Ins. Co. *v.* Bryan, 26 Wend. 563; Stone *v.* National Ins. Co., 19 Pick. 34.

[2] Hibbert *v.* Martin, 1 Camp. 538.

[3] In Levy *v.* Merrill, 4 Greenl. 180, insurance was effected against the "risks contained in all regular policies of insurance," and the policy further declared, that in case of difficulty arising concerning the adjustment of a loss, it should be settled according to the rules established at Lloyd's in London, or at the regular insurance offices in the United States. It was held, that loss by capture was a peril insured against.

[4] Lee *v.* Boardman, 3 Mass. 238; Rhinelander *v.* Ins. Co. of Penn., 4 Cranch, 29; Powell *v.* Hyde, 5 Ellis & B. 607, 34 Eng. L. & Eq. 44; Olivera *v.* Union Ins. Co., 3 Wheat. 183; Rotch *v.* Edie, 6 T. R. 413.

a subject,[1] if not for a breach of law. The word "people" has been defined to mean "the supreme power; the power of the country," whatever that may be.[2] "Capture," or its equivalent "seizure," means a taking with intent to keep;[3] "arrest," or "detention," a taking with intent to return the thing taken;[4] as where a ship is arrested by an embargo,[5] or stopped for search;[6] or detained in a port by an actual blockade thereof,[7] or, perhaps,

[1] As an embargo. Odlin *v.* Ins. Co. of Penn., 2 Wash. C. C. 312; Lorent *v.* S. Car. Ins. Co., 1 Nott & McC. 505; M'Bride *v.* Mar. Ins. Co., 5 Johns. 299; Walden *v.* Phœnix Ins. Co., id. 310; Ogden *v.* N. Y. Fire Ins. Co., 10 Johns. 177, 12 id. 25; Page *v.* Thompson, Park, Ins. 109, n. See also, Flindt *v.* Scott, 5 Taunt. 674; Anthony *v.* Moline, id. 711; Schnakoneg *v.* Andrews, id. 716; Bazett *v.* Meyer, id. 824.

[2] See Simpson *v.* Charleston F. & M. Ins. Co., Dudley, S. C. 239. It does not cover, therefore, damage done to the cargo by an armed mob. Nesbitt *v.* Lushington, 4 T. R. 783.

[3] Emerigon, c. 12, § 30, Meredith's Ed. 420, says: "In capture, the object is to appropriate to oneself the prey: *Si commette depredatione con appropriarsi il depredeto.* In an arrest of princes, there is a design to liberate subsequently the property arrested, or to pay the value of it." See also, Powell *v.* Hyde, 5 Ellis & B. 607, 34 Eng. L. & Eq. 44; Black *v.* Marine Ins. Co., 11 Johns. 287.

[4] See Emerigon as cited in note *supra.* But the court, in Mumford *v.* Phœnix Ins. Co., 7 Johns. 449, speak of an illegal condemnation as a loss under the general peril of arrests and detentions of princes. Lord *Ellenborough*, in Carruthers *v.* Gray, 3 Camp. 142, held that an averment that the ship and goods were arrested by persons exercising the powers of government at a certain place, and the goods were there detained and confiscated, was supported by proof that the goods were forcibly taken possession of by the officers of government. In Olivera *v.* Union Ins. Co., 3 Wheat. 183, *Marshall*, C. J., speaking of arrest and detainment, said: "Each of these terms implies possession of the thing, by the power which arrests or detains." The seizing of a vessel and turning it into a fire-ship, has been considered a restraint. Green *v.* Young, 2 Salk. 444, 2 Ld. Raym. 840, per *Holt*, C. J.

[5] Rotch *v.* Edie, 6 T. R. 413. The vessel in this case was detained in a foreign port by an embargo. See also, notes *infra.*

[6] 1 Magens, 67.

[7] In Olivera *v.* Union Ins. Co., 3 Wheat. 183, this was held to be a restraint, and in Wilson *v.* United Ins. Co., 14 Johns. 227, a detention. In Richardson *v.* Maine F. & M. Ins. Co., 6 Mass. 102, 109, *Parsons*, C. J., said: "In this instrument, I know of no difference between the import of restraint and detention. They are respectively, the effect of superior force, operating directly on the vessel. So long as a ship is under restraint, so long she is detained, and whenever she is detained she is under restraint." *Marshall*, C. J., on the other hand, in Olivera *v.* Union Ins. Co., *supra*, held that a detainment implied possession, while a restraint did not, and that a blockade was, therefore, a restraint. It is, however, a matter of little consequence, since the words are always used together. Saltus *v.* United Ins. Co., 15 Johns. 523, was a very similar case to that last cited, and it was decided the same way. But in Brewer *v.* Union Ins.

by being lawfully restrained from entering her port of destination by a blockading force. But it does not seem to be positively settled, whether the master has a right to abandon the voyage and claim for a total loss, on receiving intelligence that his port of destination is blockaded.[1] In a case where insurance

Co., 12 Mass. 170, where the vessel was blockaded at an intermediate port, the underwriters were held not liable. It is impossible to distinguish this case from those above cited, and we are inclined to the opinion, that the former are more correctly decided.

[1] The decisions upon this subject are conflicting. It has been held that if, while a vessel is on its voyage, the master hears that her port of destination is closed by an embargo and abandons the adventure, this is not a loss by a peril insured against. Hadkinson *v.* Robinson, 3 B. & P. 388; Blackenhagen *v.* London Ass. Co., 1 Camp. 454; Forster *v.* Christie, 11 East, 205; Amory *v.* Jones, 6 Mass. 318. And, so, if on arrival at the port of destination, it is found to be in the possession of the enemy. Lubbock *v.* Rowcroft, 5 Esp. 50; Smith *v.* Universal Ins. Co., 6 Wheat. 176. The vessel in this case, was chased off the coast, and after making several fruitless attempts to return, gave up the voyage and sailed for home. Mr. Justice *Story* said: "In cases of this sort, where a technical total loss is asserted as a ground of recovery, it is not sufficient that the voyage has been entirely frustrated and lost; but the loss must be occasioned by some peril actually insured against. The peril must act directly, and not circuitously, upon the subject of the insurance. It must be an immediate peril, and the loss the proper consequence of it; and it is not sufficient, that the voyage be abandoned for fear of the operation of the peril." It is to be observed, however, that in this case, the underwriters were expressly exempted from loss by illicit trade, as in Suydam *v.* Mar. Ins. Co., 1 Johns. 181. The case, therefore, does not support the English and Massachusetts decisions to their full extent. See Andrews *v.* Essex F. & M. Ins. Co., 3 Mason, 6, 21. In Barker *v.* Blakes, 9 East, 283, it was held, that where a neutral vessel was captured and her port of destination blockaded, pending the proceedings in admiralty, an abandonment might be made after her release, on the ground that the impossibility of prosecuting the voyage to the port of destination, was in consequence of the prolonged detention of the ship and cargo, and so might be considered a loss of the voyage. In Parkin *v.* Tunno, 2 Camp. 59, 11 East, 22, insurance was effected on goods from Bristol to Monte Video, and any other port or ports in the River Plata in the possession of the English. When the vessel arrived in the River Plata, every port except Maldonado, was in the possession of the enemy. She therefore sailed for that port, but, on her arrival was ordered away by the English commander there. She then sailed for Rio Janeiro, that being the nearest friendly port of safety, and on the way the cargo was damaged by a peril of the sea. The underwriters were held not to be liable.

The above cases proceed upon the ground, that the fear of a peril insured against, is not a good ground for an abandonment. That this principle is generally correct, cannot be denied. The only question is, when is it to be applied. See Craig *v.* United Ins. Co., 6 Johns. 226. In Richardson *v.* Maine F. & M. Ins. Co., 6 Mass. 102, it was held, that if a neutral vessel sails for a port, and is met on the way by a belligerent vessel and informed that the port is blockaded, and a warning not to proceed thither indorsed on the register, the underwriters are not liable for a loss owing to the voyage being

was effected on slaves, and the vessel was driven into a port of distress and the slaves liberated on *habeas corpus*, it was held, that this loss came within the terms "arrest, restraints, and detainments," etc.[1]

If the seizure is caused by the unlawful act of the master, it

broken up. See also, Cook *v.* Essex F. & M. Ins. Co., 6 Mass. 122; Wheatland *v.* Gray, 6 Mass. 124; Lee *v.* Gray, 7 Mass. 349; Tucker *v.* United M. & F. Ins. Co., 12 Mass. 288. In some of the States the decisions are the other way. Schmidt *v.* Union Ins. Co., 1 Johns. 249; Vigers *v.* Ocean Ins. Co., 12 La. 367; Symonds *v.* Union Ins. Co., 4 Dall. 417, 1 Wash. C. C. 382; Thompson *v.* Read, 12 S. & R. 440; Savage *v.* Pleasants, 5 Binn. 403. Mr. Justice *Brackenridge*, in this case, attached great importance to the fact, that the warning not to proceed had been indorsed on the register. He said: "It alters the character of the vessel, and makes it *sub modo*, a different property. The British themselves speak of such marking or indorsing on sea-letter and register, as giving them a qualified property in the vessel and cargo, and they act upon it accordingly, and seize and capture outright, if an attempt is made to go to another than a British port as ordered to proceed. The hailing and warning a vessel at sea, are not the same with entering on board and indorsing papers. The sound of the warning carries no impression with it, it is a monition to the warned; but who shall know that a vessel has been warned? But the writing on the sea-letter and register carries with it its own evidence, and will be seen by those who visit it afterwards. It is a charm or spell from which the vessel cannot escape; she is liable to be taken, and is uniformly taken if she attempts to proceed or to return."

In King *v.* Del. Ins. Co., 2 Wash. C. C. 300, a blockade of the port of destination, was considered as a restraint, but it was held, that where a vessel was stopped in the first part of her voyage, and warned not to proceed by an indorsement on her papers, and verbally informed that her port of destination was blockaded, and she returned home and abandoned the voyage, the underwriters on freight were not liable, the port of destination not being actually blockaded. *Washington*, J., said: "If the underwriter is to answer for a technical total loss, where none has really been sustained, it is the duty of the insured to do all he may to prevent such loss, and he should proceed upon his voyage until the danger of an actual loss is rendered manifest." This case was affirmed on appeal, 6 Cranch, 71, on the ground, that the voyage was not prohibited by the British orders in council, and the port of destination was not actually blockaded.

There is a dictum of Mr. Justice *Story*, on this subject, which is worthy of attention. He says: "Whether the turning away of a ship from the port of destination, in consequence of a blockade, be in any case a good cause for abandonment, so as to entitle the assured to recover it from the underwriter as for a total loss, by the breaking up of the voyage; and if so, whether the doctrine could apply to a policy with a warranty of neutrality, the legal effect of such warranty being to compel the party to abandon the voyage, if it cannot be pursued consistent with neutrality, are questions of great importance, upon which the court do not think it necessary to express any opinion." M'Call *v.* Mar. Ins. Co., 8 Cranch, 59. See also, Emerigon, c. 12, s. 31, Meredith's Ed. 425.

[1] Simpson *v.* Charleston F. & M. Ins. Co., Dudley, S. C. 239.

would seem that the underwriters are not liable, but in determining this point, the parties stand on their strict rights, and if the master had the right to do the act which led to the seizure, the underwriters are liable, provided he acted *bonâ fide*, although, by adopting another course, the seizure might have been avoided.[1] And where the lawfulness of the act of the master, and consequently, the legality of the seizure, depend upon the fact, whether the power which seized the vessel, had the right to exercise jurisdiction over the place where the offence was committed, the question must be determined by the fact, whether the government of the country to which the vessel belongs, recognizes the right of jurisdiction on the part of the seizing power.[2] If a suit is commenced against a captain by the government in a foreign port, and the voyage is consequently delayed, the underwriters are not liable for the detention, the proceedings being against the captain personally, and not against the ship.[3]

Policies are sometimes made containing a stipulation authorizing the vessel to proceed to another port, in case the port of original destination is blockaded.[4] And insurance is

[1] Sewell *v.* Royal Exch. Ass. Co., 4 Taunt. 856; Williams *v.* Suffolk Ins. Co., 3 Sumner, 270, 13 Pet. 415.

[2] Williams *v.* Suffolk Ins. Co., 3 Sumner, 270, 13 Pet. 415. The question in this case was, whether the government of Buenos Ayres had jurisdiction over the Falkland Islands, and the court held that it was bound by the acts of the government of the United States, and could not examine the question *de novo*.

[3] Bradford *v.* Levy, 2 Car. & P. 137.

[4] Naylor *v.* Taylor, 9 B. & C. 718; Ferguson *v.* Phœnix Ins. Co., 5 Binn. 544. In this latter case, the insurance was on sugars from New York to Amsterdam, "with liberty, in case of being turned off on account of blockade, to proceed to a neighboring port." On the voyage, the vessel was boarded by a British privateer and her papers indorsed, "warned not to enter, or attempt to enter, an enemy's port." In consequence of this, she proceeded to Cowes, remained there about a month and a half, paid duties, obtained a license for Amsterdam, and was about to depart, when she was seized by a British vessel and sent into Portsmouth. The vessel was libelled and restored. The captain then sailed again for Amsterdam, but was captured by the British, the vessel was a second time libelled and again restored. By this time her license had expired, and information having been received that the decrees of the French and Dutch governments, prohibiting the entry into their ports of any vessels coming from England, were rigorously enforced in Holland, the captain took the ship to London and landed her cargo. On the receipt of this intelligence, the plaintiffs abandoned. A majority of the court, consisting of two judges, held that London was

often made against *unlawful* arrests, restraints, and detentions only.[1]

a neighboring port within the meaning of the exception, and that, as the captain was justified in going there under the policy, the voyage was to be considered as there completed, and that the underwriters were therefore not liable. Mr. Justice *Brackenridge*, was of the opinion, that the indorsing the papers was a capture *sub modo*, and that a port of England was not a "neighboring port," within the meaning of the exception, on account of the nature of the cargo. The learned judge states in his decision, that the vessel was ordered to proceed to a British port, when first stopped on the high seas. This does not appear by the statement of facts in the case, but is important, as showing that the voyage to Cowes, was not a deviation, but imposed by necessity. The learned judge was, however, of the opinion, that the delay at Cowes amounted to a deviation which discharged the underwriters, and so agreed with his brethren in the result. See also, Snowden *v.* Phœnix Ins. Co., 3 Binn. 457, 473.

In Radcliff *v.* United Ins. Co., 7 Johns. 38, 9 Johns. 277, the policy contained this clause, namely: "the insurers take no risk of a blockaded port, but if turned away, the assured to be at liberty to proceed to a port not blockaded." It was held, that if the port was actually blockaded, the underwriters were not liable, either for a legal or an illegal seizure occasioned by an attempt to enter it. In Tenet *v.* Phœnix Ins. Co., 7 Johns. 363, insurance was effected on a vessel from New York to Bordeaux, warranted not to abandon, if detained or captured, until after the expiration of a certain time, "nor if refused admittance or turned away, but may proceed to another *near open port*." When the vessel was about twenty leagues from the Island of Oleron, she fell in with a British squadron, and was informed that the whole continent was blockaded, and a warning not to proceed was indorsed on the register. The captain was ordered to proceed to England or Malta or return home. He then sailed for England, but having met with a storm, put into L'Orient in distress, where the vessel was seized. Held, that whether Bordeaux was blockaded or not, made no difference, as the facts showed that the vessel was prevented from entering her port of destination by the presence of the squadron, that the ports of France were to be considered as "open ports," and that the term "*near* open port," was to be considered as used in a geographical sense, and not as depending on a facility of reaching a distant port, if the wind should happen to be favorable, and that a port in England was not a near port.

[1] In such a case, the qualification "unlawful," applies to "restraints and detainments," as well as to arrests, and the underwriters are not liable in case the voyage is broken up by the port of destination being lawfully blockaded. M'Call *v.* Marine Ins. Co., 8 Cranch, 59; Thompson *v.* Read, 12 S. & R. 440. But, if the restraint is not authorized by the law of nations, it is unlawful, as where a neutral vessel with a cargo laden before the commencement of the blockade is prevented from leaving port. Olivera *v.* Union Ins. Co., 3 Wheat. 183.

SECTION VIII.

OF THE GENERAL CLAUSE RESPECTING OTHER PERILS.

There is nothing in the law of insurance which prevents parties from agreeing upon insurance against other perils than those usually enumerated, and specifying them in the policy. But the general clause which is usually inserted against "all other risks and perils," enlarges the scope and operations of the policy very little, because, by a common principle of construction (that general words are restrained by the particular recital),[1] it is always construed to mean other perils of like nature or character with those enumerated, which would therefore be included, generally at least, in the other clauses. But these words have been declared by courts to be material and operative, and insurers have been held liable under them, but, as it seems, in most of these cases they might have been held liable as well under other clauses.[2] It has been held that an extraordi-

[1] 2 Rolle, Abr. 409; Payler *v.* Homersham, 4 M. & S. 423; Moore *v.* Magrath, 1 Cowp. 9; Rich *v.* Lord, 18 Pick. 322; Jackson *v.* Stackhouse, 1 Cow. 122.

[2] In Cullen *v.* Butler, 5 M. & S. 461, the vessel was lost by being fired into through mistake. Held, that the loss was covered by the general clause. Lord *Ellenborough*, C. J., said: "The extent and meaning of general words have not yet been the immediate subject of any judicial construction in our courts of law. As they must, however, be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of this instrument; and which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes." The following have been held to be covered by the general clause. Damage done to a vessel while in a graving dock for repairs, by being blown over by the wind. Phillips *v.* Barber, 5 B. & Ald. 161: or by the explosion of the boiler. Perrin *v.* Protection Ins. Co., 11 Ohio, 147. Or while the vessel is being hauled up on a marine railway, and is partly in the water and partly on land. Ellery *v.* New England Ins. Co., 8 Pick. 14; injury sustained by the accidental breaking and giving way of the tackle and supports whereby the vessel was supported in being moved from a dock where she had been hauled up for repairs. Devaux *v.* J'Anson, 5 Bing. N. C. 519. So dollars thrown overboard to prevent their falling into the hands of the enemy, one of the perils enumerated being

nary duty laid on goods at the port of destination between the time of the capture of a vessel and her release and arrival, is not covered by an insurance against "all unavoidable perils, losses, and misfortunes to the damage of the goods;" the loss being occasioned by a political event not insured against.[1] Courts have been disposed to construe "against all risks," when written and not printed, as an insurance against every thing but the fraud of the assured; but it may be doubted whether, in practice, even this phrase should be permitted to extend its operation quite so indefinitely.[2]

jettison, which was considered as not confined to the signification it has in general average, but as meaning any casting overboard *ex justa causa*, are protected by this clause. Butler *v.* Wildman, 3 B. & Ald. 398. So, it would seem is loss by barratry committed by one part-owner against another, or against any other party in interest. Per *Martin*, B., Jones *v.* Nicholson, 10 Exch. 28, 26 Eng. L. & Eq. 542. In Moses *v.* Sun Mut. Ins. Co., 1 Duer, 159, it was held that a loss occasioned by the sale of a part of a cargo of provisions to pay for necessary supplies at an intermediate port; and the necessary consumption of the rest by the passengers and crew, owing to the want of a proper supply on board the ship, was not covered by this clause. Mr. Justice *Duer*, said: "The words of the general clause, broad as they are, in this as in many analogous cases, are limited in their application by the specification that immediately precedes them, and therefore have their due effect assigned to them, by allowing them to comprehend and cover only such other cases of marine damage as are of the like kind (*ejusdem generis*) with those specifically enumerated, and are occasioned by similar causes." In Caldwell *v.* St. Louis Perpet. Ins. Co., 1 La. Ann. 85, the policy contained this clause, insuring against, "all other perils, losses, and misfortunes which shall come to the damage of the said boat, according to the general law of insurance." Held, that this covered a loss by a collision produced by the negligence of the officers of another boat. In Perkins *v.* New England Mar. Ins. Co., 12 Mass. 214, a license was insured "not only against capture, but against its being destroyed or rendered useless, by the ordinary perils of the seas, fire, or otherwise." The ship was afterwards boarded, the license was indorsed by a British officer, and thus rendered useless. Held that there was a loss within the policy.

[1] De Peau *v.* Russell, 1 Brev. 441.

[2] In Goix *v.* Knox, 1 Johns. Cas. 337, the court said: "This expression is vague and indefinite, but if we allow it any force, it must be considered as creating a special insurance, and extending to other risks than are usually contemplated. We are inclined to give it a liberal construction, and apply it to all losses, except such as arise from the fraud of the assured." See also, Skidmore *v.* Desdoity, 2 Johns. Cas. 77. In Marcy *v.* Sun Mutual Ins. Co., 11 La. Ann. 748, insurance was effected on a floating dock against "all risks." It was held that this term meant all river and harbor risks, so far as they were applicable to floating docks, and that evidence as to the general meaning of the phrase was not admissible, it not being shown to be so used in reference to floating docks.

SECTION IX.

OF EXCEPTED RISKS AND LOSSES.

As nothing prevents the parties from extending the contract of insurance at their own pleasure, so they may limit it as they think proper, by expressly excepting, or, which is the same thing, warranting against some of the perils usually insured against. The most usual exception relates to illicit, or prohibited trade. This is not the same with contraband trade, although the words are sometimes used as if synonymous; for, as has been seen, it is not against the law, either of nations, or of any neutral nation, for its subjects to break through a blockade, or supply a belligerent, if they can; they take the risk of capture for so doing, but if they please they may encounter that risk. Illicit, or prohibited trade, on the contrary, is one which cannot be carried on without a distinct violation of some positive law of the country where the transaction is to take place. Of course such trade, or an attempt at such trade, exposes the guilty party to the consequences of it, which are usually seizure and condemnation. But no loss by forfeiture for such cause throws any responsibility on the insurers, if there be an exception of this risk, or a warranty against it, as is the case in most American policies; because such an exception at once intimates that the insured expects to attempt such trade, and agrees to stand his own insurer against its peril. It should be noticed, however, that this exception relates only to the property insured in the same policy, and not to other goods in the same ship; for if there be this warranty against "loss by illicit trade," and both insurers and insured know that other goods than those covered by the policy are on board, which other goods are contraband, and the ship and cargo are seized, condemned, and lost, on account of these other goods, the insurers are still held, because this warranty is to be read as if it were against "loss by illicit trade in the goods hereby insured."[1]

[1] Cucullu *v.* Orleans Ins. Co., 18 Mart. La. 11, 13. In Bowne *v.* Shaw, 1 Caines, 489, both parties knew that other goods were on board, which were illicit, and the under-

This exception may give rise to three classes of questions; one where there has actually been this excepted trade and a consequent forfeiture; one where there has been an attempt at such a trade, never carried into effect, but followed by a seizure and condemnation for the attempt; the third where there has been neither the trade nor an attempt at the trade, but nevertheless a seizure and condemnation, grounded on an alleged violation of law, but not justified in fact. In the first case the insurers are certainly exonorated. In the second, they are exonerated where the seizure and condemnation were legal and justifiable by reason of any endeavor to do the thing embraced within the exception or warranty. In the third case, the insurers are not exonerated. That they are not liable for the consequences of an attempt to do that which is not done, if they would not be liable if the thing were done, seems to follow from the fact that the insured take upon themselves by the exception, *all* the risks springing from the trade, and it is fair to say that a peril arising from an attempt to enter into it is one of them.[1] On the other hand, if the property is lost by the illegal and unjustifiable conduct of a foreign court, this is a loss which the insurers cannot say arose from a prohibited trade, when there never was any such trade and no attempt at it; for the insurers have no right to defend themselves under a false pretence, merely because a foreign court have defended themselves under that same false pretence;[2]

writers were held. So in De Peyster *v.* Gardner, 1 Caines, 492, where the underwriters knew the fact but the insured did not.

[1] Church *v.* Hubbart, 2 Cranch, 187; Higginson *v.* Pomeroy, 11 Mass. 104. See also, Smith *v.* Delaware Ins. Co., 3 Wash. C. C. 127. It has so been held also where the vessel was not allowed to enter her port of destination. Smith *v.* Univ. Ins. Co., 6 Wheat. 176; Suydam *v.* Mar. Ins. Co., 1 Johns. 181; Speyer *v.* New York Ins. Co., 3 Johns. 88. In Tucker *v.* Juhel, 1 Johns. 20, the government of Antigua had given permission for American vessels to export sugar on certain conditions. These were complied with, and the vessel began to load. After the conditions were complied with, but before she began to load, the permission to export was revoked. The president of the island gave an opinion that vessels which had complied with the conditions might be cleared with their sugar. This was done in the present case, but the vessel was captured and the cargo condemned for a breach of the laws of trade. Held, that the president had no authority to so interpret the law, and that the underwriters were not liable.

[2] Mr. Justice *Story*, in Carrington *v.* Merchants' Ins. Co., 8 Pet. 495, states the law as follows: "A seizure or detention, which is a mere act of lawless violence, wholly unconnected with any supposed illicit or contraband trade, is not within the terms or spirit of the exception. And as little is a seizure or detention not *bonâ fide* made upon

and the same principle applies to an exception of breach of blockade.[1]

There must be an actual seizure to bring a case under this exception or warranty. Neither an attempt at a prohibited trade, nor the actual trade, will suffice without seizure for it.[2]

a just suspicion of illicit or contraband trade. If there has not been an actual illicit or contraband trade, there must at least be a well-founded suspicion of it, a probable cause to impute guilt, and justify farther proceedings and inquiries, and this is what the law deems a legal and justifiable cause for the seizure or detention. No seizure or detention, not justifiable by the law of nations, can come within the present exception, and every seizure which is justifiable by the law of nations must be deemed within it." It was therefore held that if the seizure was *bonâ fide* and on account of illicit or contraband trade, a sentence of condemnation or acquittal, or other regular proceedings to adjudication, were not necessary to discharge the underwriters.

But if "there was a mere lawless seizure or detention under the pretext of illicit or prohibited trade, and it was utterly unfounded and without any reasonable cause of suspicion, and was used merely as a pretence to cover an intentional fraud or tort, then the seizure or detention was not such as is contemplated in the clause." Per *Story*, J., in Bradstreet *v.* Neptune Ins. Co., 3 Sumner, 600, 615. See also, Magoun *v.* New England Mar. Ins. Co., 1 Story, 157.

[1] In Yeaton *v.* Fry, 5 Cranch, 335, a vessel was insured "at and from Tobago to one or more ports in the West Indies, and at and from thence to Norfolk," against all risks, blockaded ports and Hispaniola excepted. The vessel sailed for a port which was then blockaded in fact, although this was not known when she sailed. Being warned off, the master directed his course for Norfolk, but on the way the vessel was plundered by a French privateer, and ordered to St. Domingo for trial. The underwriters were held liable. In Radcliff *v.* United Ins. Co., 7 Johns. 38, 9 Johns. 277, the policy contained this clause, "the insurers take no risk of a blockaded port, but if turned away, the assured to be at liberty to proceed to a port not blockaded." The vessel was taken and condemned for a breach of blockade. Held, that it made no difference whether this seizure was legal or illegal. See Laing *v.* United Ins. Co., 2 Johns. Cas. 174, 487; Johnston *v.* Ludlow, 2 Johns. Cas. 481, 1 Caines, Cas. xxix.

[2] Graham *v.* Pennsylvania Ins. Co., 2 Wash. C. C. 113, 120. *Washington*, J., in this case said: "An illicit trade unaccompanied by a seizure, or an unfounded seizure for a supposed illicit trade, where none took place, will not affect his (the assured's) right to recover." In Kohn *v.* New Orleans Ins. Co., 12 La. 348, the policy contained the usual clause. There was a general law of Mexico prohibiting the exportation of bullion. The insurance was on bullion from any port in the Gulf of Mexico to New Orleans. The vessel put into Tampico in distress, and was totally lost. Part of the bullion was shipped to Mobile, and the rest was sunk in shallow water with a view to its recovery. The underwriters were held liable. In Smith *v.* Delaware Ins. Co., 3 S. & R. 74, goods were insured from Baltimore to Hamburg, with liberty to touch at Toningen, warranted American property, with the usual clause in regard to illicit trade. The vessel was seized off Cuxhaven by the French and carried to Hamburg, and the cargo condemned by Napoleon in person. At the time of the seizure, the French forces had command of the Elbe, but the senate of Hamburg continued to exercise its functions, and there was an American consul at Hamburg. *Tilghman*, C. J., said: "There must be both a seizure and an illicit or prohibited trade. It is not

In some policies, capture and seizure of any kind are expressly excepted,[1] or the insurers assume the risk while the vessel is at

enough that a seizure is made on an allegation of prohibited trade. It must be proved that there was a prohibition, and that the case is within it. And it must be a legal prohibition, such as the prohibiting power had a right to make." It was held that the temporary occupation by a belligerent of a neutral country without dissolving the government, did not give the occupant the right to make municipal regulations of which other nations were bound to take notice. And that a seizure for breach of such regulation was not within the exception. See Donaldson *v.* Thompson, 1 Camp. 429. It was also held that the Berlin decree was illegal, and that the underwriters were liable for a loss occasioned by a violation of it. But see Speyer *v.* New York Ins. Co., 3 Johns. 88. The decree was not known when the vessel sailed, and was considered therefore not to apply. And the condemnation being made by Napoleon in person and not by any court of competent jurisdiction, it was held to be an act of violence not falling within the true intent of the warranty. This case was decided in 1817, but in 1811, in an action on a policy on the same voyage, *Washington*, J., held that it made no difference that the insured did not know of the decree, and decided the case in favor of the defendants on the ground that there was a breach of the warranty of neutrality owing to the absence of the documents which were required by the decree, of which the insured had no knowledge. The other points were not touched upon. Smith *v.* Delaware Ins. Co., 3 Wash. C. C. 127. It was held also in Faudel *v.* Phœnix Ins. Co., 4 S. & R. 29, that a seizure for a violation of the Berlin decree was not a seizure within the exception, it being against the law of nations. See also, Cucullu *v.* Orleans Ins. Co., 18 Mart. La. 11; Gracie *v.* New York Ins. Co., 13 Johns. 161. "To constitute a breach of such warranty," said *Sutherland*, J., in Francis *v.* Ocean Ins. Co., 6 Cow. 404, 427, "the seizure must be for an actual, illicit, and prohibited trade. A seizure and condemnation under pretext of such trade is not sufficient, if the trade is not in fact illicit. Both a seizure and illicit trade must concur; and the illicit character of the trade is not proved merely by the fact of the seizure." See also, Johnston *v.* Ludlow, 2 Johns. Cas. 481, 1 Caines, Cas. xxix; Savage *v.* Pleasants, 5 Binn. 403.

[1] In Powell *v.* Hyde, 5 Ellis & B. 607, 34 Eng. L. & Eq. 44, a vessel and her cargo were insured from Galatz to London. The policy was in the usual form but contained a stipulation that the ship and goods were warranted "free from capture and seizure, and the consequences of any attempt thereof." The vessel passed the mouth of the Ismail river where there was a Russian fort, and close enough to the shore to be hailed, with the English ensign flying, without being molested or receiving any communication from the shore. After the vessel had passed the fort about half a mile, two guns were pointed at her, and fired till the vessel sunk. After the firing commenced the anchor was dropped and the sails lowered. The officers and crew escaped in their boats, and landed on the Russian side of the river, where they were detained as prisoners several weeks. War, at this time, had not been declared between England and Russia. Held that the exception covered illegal as well as legal seizures, and that there was a seizure in point of law. Lord *Campbell*, C. J., said: "I am clearly of opinion upon the evidence laid before us, that when the Russian guns fired, and the ship dropped her anchor, and the crew forsook her, and she was at the mercy of the Russians, she was seized by the Russians, just as much as if the Russians had actually come on board and taken manual possession of her, and afterwards sent her to the bottom. If they had done that it would have been a seizure; although after she is

sea, but not while she is in her port of discharge. And the question has arisen, what is to be considered as such port?[1]

Excepted risks are sometimes, by the circumstances of the case, mingled with those insured against, so that it is not quite easy to say to which class the loss is owing; as where a ship warranted free from capture, was first stranded on the coast of Spain, and then seized and made prize of. The general rule must be, that the insurers are liable or exonerated, according as the leading and principal cause of the loss be one insured against or one that is excepted.[2] Thus where goods are insured against

seized, they choose, instead of taking her into port, to send her to the bottom of the Danube, still it is a seizure."

In Black *v.* Mar. Ins. Co., 11 Johns. 287, insurance was effected against capture only, warranted free from seizure in any river, port or place, under the jurisdiction of Napoleon, or under the jurisdiction of any power under his control or in alliance with him. The vessel was taken on the coast of Holland, by two French privateers, and carried into Amsterdam, and afterwards condemned as prize of war. It was held that though the word "seizure" was generally applicable to a taking or detention for the violation of some municipal regulation, yet here it was to be taken as meaning the same as capture, because to give the exception any effect it must be construed to limit the risk assumed by the general words of the policy, and here the insurance was against capture only, and the underwriters were therefore held not to be liable, Holland being in alliance with or under the control or jurisdiction of Napoleon.

[1] In Dagleish *v.* Brooke, 15 East, 295, and in Maydhew *v.* Scott, 3 Camp. 205, it was held that a vessel in the roads of Pillau, two miles from the inner harbor, was to be considered as in the port of discharge. In each of these cases the vessel was seized by a land force. But in Brown *v.* Tierney, 1 Taunt. 517, the vessel while in the same roads was taken by a French privateer, and the underwriters were held liable. In Oom *v.* Taylor, 3 Camp. 204, a vessel bound for Rugenwald, anchored about two miles and a half from the harbor of that place, and made a signal for a pilot. A pilot boat came in consequence, but with douanniers on board, who carried the ship into the harbor where the cargo was seized and condemned. Held, that this was a seizure within the port of discharge. And in Jarman *v.* Coape, 2 Camp. 613, 13 East, 394, where a vessel bound for the port of Varrel, was seized in the river Jahde, fifteen miles from that place, the underwriters were discharged. The case, however, turned in a great measure on the fact that there was evidence that the parties contemplated landing the goods somewhere along the banks of the river, rather than at Varrel. In Mellish *v.* Staniforth, 3 Taunt. 499, the vessel was captured while at anchor four miles from the roads of her port of discharge. The underwriters were held liable. So where a vessel was captured after coming to anchor outside of the roads of Pillau. Levy *v.* Vaughan, 4 Taunt. 387; Keyser *v.* Scott, 4 Taunt. 660. And in Baring *v.* Vaux, 2 Camp. 541, where a vessel was captured by a privateer while lying within the headlands of the river, half a mile from her port of destination, the jury having found that she was not in port at the time, a verdict was found for the plaintiff. The criterion adopted in many of these cases seems to be whether the ship was in the place where vessels usually unloaded their cargoes.

[2] Hahn *v.* Corbett, 2 Bing. 205. The insurance in this case was on goods warranted

fire, and loss by theft is excepted, the insurers are not liable for a loss by theft, which took place after the goods had been removed

free from capture. The vessel was lost by striking on a sand bar nine miles from the coast. Part of the goods were saved by the enemy in a damaged condition. The court considered the loss as total when the ship struck, and held therefore that the right of the owner to recover could not be changed by subsequent events. *Park*, J., said: "Supposing the goods had been sunk, the assured would have been entitled to recover for a total loss; and if they had afterwards been fished up by the enemy, would that have made any difference? Assuredly not." See also, Bondrett *v.* Hentigg, Holt, N. P. 149. In Livie *v.* Janson, 12 East, 648, it was held that where there was a partial loss by sea damage, and a subsequent total loss by an excepted peril, there could be no recovery for the sea damage. And this decision was sustained by *Kent*, C. J., in Schieffelin *v.* New York Ins. Co., 9 Johns. 21, where, the ship being lost, the master was prevented from carrying on the goods, which he might otherwise have done, by a seizure by government. It was held that the defendants were not liable. See, on this question of a partial loss being merged in a total loss, Knight *v.* Faith, 15 Q. B. 649. In Rice *v.* Homer, 12 Mass. 230, the vessel was damaged while on her voyage, by sea perils to the extent of three fourths of her value, and part of the cargo, which was also insured, was thrown overboard. In consequence of this misfortune, the vessel was forced to put into port, where she was seized by the government and condemned. It was held that the vessel was lost by the seizure, which being an excepted peril, the underwriters were not liable. But the assured were allowed to recover for the cargo which had been jettisoned, on the ground that it would have been lost whether the ship had been captured or not. In Green *v.* Elmslie, Peake, N. P. 212, the vessel was insured against capture only, and was driven out of her course on to the coast of France and then captured. It was held that the underwriters were liable. In Levi *v.* Allnutt, 15 East, 267, goods insured were warranted free from *confiscation* by the government in the ship's port or ports of discharge. While in the roads of Pillau, the vessel was seized by some Prussian soldiers from Pillau, and by some Frenchmen from a privateer. These disputed about the possession, and the matter was referred by the Prussian government to the French government at Paris. The ship was condemned as prize to the French captors. It was held not to be a *confiscation* by the Prussian government. Lord *Ellenborough* said: "It only showed a permission by the Prussian government that France should do as it pleased in the Prussian ports: and to hold this to be a Prussian confiscation would be saying that every country on the continent too weak at this period to protect its independence against France, confiscated all the property which the French choose to take within its territories."

In Duval *v.* Comm. Ins. Co., 10 Johns. 278, no risk was taken in port but a sea risk. The vessel was captured at sea and taken into port, and there taken possession of by the French government. Held that the underwriters were liable. Per *Curiam*. "If the taking possession of the vessel in this manner is to be deemed a capture, and of which there can be no doubt, the subsequent proceedings against her or the cargo are totally immaterial, if she was never released from the capture. Admitting that the proceedings after her being carried into Port Passage, are to be deemed a seizure in port, it will not discharge the underwriters. The capture was so far a total loss as to justify an abandonment; and unless released or restored before such abandonment, the rights of the parties were fixed, and it is immaterial what further perils awaited the property." The case of Barney *v.* Maryland Ins. Co., 5 Harris & J. 139, is not in conflict with this decision, as is stated by Mr. Phillips. The policy contained an

to save them from the fire.[1] This question is similar to that where a loss takes place from the occurrence of perils insured against, and perils not specifically excepted, though not insured against, and also where the loss is owing to a cause which is in some degree connected with and resulting from a peril insured against, or the converse. To determine the difficult and important questions which arise in regard to this subject, recourse is had to the rule of "*causa proxima non remota spectatur.*" Some of the difficulties attending the application of this rule we have already considered, in determining which is the proximate and which the remote cause of the loss, when a loss takes place by a peril insured against, and this peril could have been safely encountered but for the negligence of the servants of the assured. And we shall here content ourselves with mentioning some of the authorities which illustrate, if they do not determine the proper mode of applying this maxim.

Thus, if goods are damaged by the dampness arising from water in the hold of a vessel, the dampness is considered as the proximate cause in Massachusetts, and the underwriters are not liable;[2] while in England, where the goods were damaged by the vapor arising from hides which had been injured by sea water entering the hold, it was said to be a mere playing with terms not to call the water the proximate cause.[3] And where a vessel went ashore in consequence of two men, who had been sent on shore to cast off a rope, being seized by the press gang, the un-

exception of seizure in port. The vessel was captured and carried into port, and by order of the minister of the marine, without any legal condemnation, was converted into a public armed ship. The policy contained a clause whereby the insured stipulated not to abandon in case of capture till condemned. Held, that the insured could not abandon for the capture, there having been no condemnation, and that the act of the minister was a seizure in port. Where no risk in port but sea risk was taken, and the vessel while in port was stranded and forty-eight hours afterwards destroyed by a hostile force, the jury having found that the vessel was totally lost by the stranding, the court refused to set aside a verdict for the plaintiffs, and also held that the term "port" was not confined to the port of departure, or to the port of discharge, but was used in a general sense as contradistinguished from the high seas. Patrick *v.* Comm. Ins. Co., 11 Johns. 9.

[1] Webb *v.* Protection Ins. Co., 14 Mo. 3.

[2] Baker *v.* Manufacturers' Ins. Co., Sup. Jud. Ct., Mass., March Term, 1851, 14 Law Reporter, 203.

[3] Montoya *v.* London Ass. Co., 6 Exch. 451, 4 Eng. L. & Eq. 500.

derwriters were held liable.[1] If a ship is disabled by a peril of the sea, and while at an intermediate port the master, to defray the expense of repairs, is obliged to sell part of the cargo, and apply the proceeds to this purpose, the underwriter on the cargo is not liable, the peril being but the remote cause of the loss.[2] In the same manner the insurer has nothing to do with the results consequent upon the protraction of the voyage.[3] But he is liable for all the consequences directly resulting from a peril insured against; as where a boat is lost after a storm has ceased in consequence of damage done during the storm.[4]

[1] Hodgson *v.* Malcolm, 5 B. & P. 336.

[2] Powell *v.* Gudgeon, 5 M. & S. 431; Sarquy *v.* Hobson, 2 B. & C. 7, affirmed in the Exchequer Chamber, 1 Young & J. 347, 4 Bing. 131; Moses *v.* Sun Mutual Ins. Co., 1 Duer, 159.

[3] In Tatham *v.* Hodgson, 6 T. R. 656, where a number of slaves died in consequence of an insufficient supply of water caused by the voyage being protracted by bad weather, it was held that the underwriters on the slaves were not liable. In Jones *v.* Schmoll, Park, Ins. 77, 1 T. R. 130, note, the underwriters were liable for "mortality by mutiny." A mutiny took place and some of the slaves were killed, others wounded, and others starved themselves to death, and the value of the survivors was lessened on account of the mutiny having taken place. It was held that the underwriter was liable for those who were killed during the mutiny, and for those who died in consequence of their wounds, but not for the loss of the market. "The jury found, that all who were killed in the mutiny, or died of their wounds, were to be paid for. That all those who died of their bruises, which they received in the mutiny, though accompanied with other causes, were to be paid for. That all who had swallowed salt water, and died in consequence thereof, or who leaped into the sea, and hung upon the sides of the ship, without being otherwise bruised, or who died of chagrin, were not to be paid for."

[4] Potter *v.* Ocean Ins. Co., 3 Sumner, 27. In Naylor *v.* Palmer, 8 Exch. 739, 22 Eng. L. & Eq. 573, Palmer *v.* Naylor, 10 Exch. 382, 26 Eng. L. & Eq. 455, a cargo of coolies, on whom insurance was effected, seized the vessel, killed the captain and part of the crew, and took the vessel into port and then ran away, leaving the vessel in the possession of the mate and the rest of the crew. It was contended that the unwillingness of the coolies to be carried on was the proximate cause of the loss. But the court held that to determine what was the proximate cause, reference must be had to the time when the loss took place, and this was considered to be when the vessel was first seized. In McCargo *v.* New Orleans Ins. Co., 10 Rob. La. 202, slaves were insured from Norfolk to New Orleans, against all risks, and chiefly against that of foreign interference, but there was a warranty on the part of the assured against loss by elopement, insurrection, and natural death. While the vessel was on her voyage, slaves, other than those of the plaintiff, arose and seized the vessel and carried her into a British port where the slaves were liberated by the British government; the crew did not regain possession of the vessel till after this took place. It was held that the insurrection was to be considered the cause of the loss, and not the interference of the government, and the court said that the last cause of the loss was not always, nor necessarily, the proximate cause.

Exceptions are often made — as they always may be — at the pleasure of the parties, to suit the peculiar circumstances of the case; and no other rule can be given, than that such exceptions must always be construed according to the actual intention of both parties, so as to carry it into effect, rather than defeat it. Thus, where animals were insured "free from mortality," and many were killed by the rolling of the ship in a tempest, the court held that the mortality excepted must be construed in its usual sense, and that this did not include the idea of a violent death.[1]

[1] Lawrence *v.* Aberdein, 5 B. & Ald. 107. So, where horses, in consequence of the laboring of the vessel, broke down the partitions by which they were separated, and by their kicking, bruised and wounded each other so much that they died, it was held, that this was a loss by a peril of the sea. Gabay *v.* Lloyd, 3 B. & C. 793.

"Free from loss, if not permitted to *entry*, in consequence of having negroes on board," means that the underwriters are not liable if the vessel is refused entry at the custom-house, and does not mean that the vessel should be exempt from a compliance with the customary port regulations as to the mode and place of discharging her cargo. Dickey *v.* United Ins. Co., 11 Johns. 358. In Law *v.* Goddard, 12 Mass. 112, the underwriters were exempted from all loss or expense that might arise from the ordinary dangers and perils of the seas. Held, that the only risks intended to be covered, were capture, arrest, detention, &c.

In Coolidge *v.* N. Y. Firem. Ins. Co., 14 Johns. 308, the policy contained the following memorandum, "Warranted free from loss by the British or Americans, but in case of capture or detention by either of the above-named powers, the usual sea risks to continue." The vessel was captured by a British brig and carried into Gibraltar. While there, the vessel was moored in a dangerous and exposed situation, in consequence of which several vessels ran into her, and injured her very much. Held, that as the underwriters would have been exonerated had no capture intervened, they were not liable for the negligent act of the captors, which was the proximate cause of the loss. At the present time, probably, the collision would be considered as the proximate cause. Being prevented from leaving port by a blockading squadron, is a detention within the exception, "Warranted free from British and American capture and detention." Wilson *v.* United Ins. Co., 14 Johns. 227.

The exception "French risks," means loss by the acts of Frenchmen. Roget *v.* Thurston, 2 Johns. Cas. 248.

In Palmer *v.* Warren Ins. Co., 1 Story, 360, the following clause in a time policy for one year, was the subject of considerable discussion and difficulty, "excluding during the term all ports and places in Mexico and Texas, also the West Indies from July 15th to October 15th, 1839, each at noon." The vessel sailed for Cuba and arrived there about the first of October, sailed from there on the 25th for New York, and was wrecked in Long Island Sound on the 15th of December following. It was held, that this was not a warranty that the vessel should not be employed in any voyages to, or from the ports mentioned within the times specified, nor was it to be construed as allowing such voyages during the period, but exonerating the underwriters from all liabilities for losses in the course thereof, but it meant merely, that all risks

Important questions as to risks excepted arise in respect to bottomry and *respondentia* interests. The nature of these interests has been fully considered in the preceding volume. It was there shown, that it is of the essence of these contracts, that the lender of money on bottomry and *respondentia*, takes upon himself the risk of the safe arrival of the ship, or of the goods, on which he has his lien.

He therefore can, and often does, insure himself. This is in the nature of reinsurance, and by it, the lender often makes his debt certain and keeps his excessive interest or much of it. As if he lends a sum at fifteen per cent. marine interest, when legal interest is six per cent., if he insures himself for three per cent., he may get his money and twelve per cent. if the property be lost. Some question has been made, as to the extent and nature of his insurable interest; but we are not able to see any good reason why his insurable interest is not commensurate with the value of the property, in like manner as the interest of a mortgagee.[1]

and losses in the ports and places specified and within the time mentioned, were excluded. The underwriters were therefore held liable.

In Louisiana, it is provided by law, that the underwriters shall not be liable for a loss by accidents in racing, collision with another boat, etc., "except such as is impossible to be foreseen, and avoided." This has been held to have reference to an impossibility by reasonable intendment according to the circumstances of each particular case. Caldwell *v.* St. Louis Perpet. Ins. Co., 1 La. Ann. 85. In Citizens Ins. Co. of Mo. *v.* Glasgow, 9 Mo. 406, there was a provision that the underwriters should not be liable for the bursting of boilers or breaking of engines, unless occasioned by external violence. One boiler burst and threw overboard the other two. Held, that external violence meant violence external to the boat and not to the engine or other boilers merely, and that the underwriters were therefore not liable. In a late case in Pennsylvania, Western Ins. Co. *v.* Cropper, Jan., 1859, 7 Am. Law Register, 237, the policy contained the following clause: "It is understood that this company is not liable for any breakage or derangement of the engine, or bursting of the boiler, or any of the parts thereof, or for the effects of fire from any cause connected with the operation of, or the repairs of the engine and boiler, unless the damage be occasioned and the repairs rendered necessary by the stranding or sinking of the vessel, after her engines and boilers shall have been put in successful operation." It was held, that the underwriters were liable for a total loss, although that loss could be traced back to the breakage of the machinery as its first cause, the court being of the opinion, that the clause did not except damage caused by the breakage of the machinery.

[1] Simonds *v.* Hodgson, 3 B. & Ad. 50. In Goddart *v.* Garrett, 2 Vern. 269, decided in 1692, money was lent on bottomry and the lender effected an insurance on the ship to protect his claim. As he had no other interest in the ship, the court ordered the policy to be delivered up and cancelled. The insurance was declared to be on bottomry, and the decision cannot be supported. See Harman *v.* Vanhatton, 2 Vern.

It may be added in this connection, although the subjects have been already considered, that no policy will enure to the benefit of a party who cannot be legally insured, as an alien enemy, for example, or will attach to a subject-matter in interest which cannot be legally possessed by the insured, or to a trade which is prohibited by the laws of the country where the insurance is made, or against perils or risks which positive law or the certain policy of the law, excludes from the benefit of indemnity by insurance.

SECTION X.

OF THE MEMORANDUM.

A. *Of the Articles Enumerated in the Memorandum.*

The policies in general use in this country, except from all loss that is not total or a subject for contribution, certain articles, and from all loss by damage that is less than certain proportions, other enumerated articles of cargo (all of these articles being especially liable to damage), and sometimes, the ship and freight. These exceptions were originally introduced in English policies, in a note or memorandum; and still are so, in those policies generally; but in this country, they are usually inserted in the body of the policy, although we still use the phrases, memorandum risks, memorandum articles, and memorandum rates. These vary very much in different States and different offices; and we add, in our appendix, the principal memorandum rates and exceptions, from a very full and accurate note to Section 54, of Phillips on Insurance. And we give also, tables of the peculiar risks and rules

717. But the lender on bottomry or *respondentia* must specify his interest, and a general insurance on the ship or cargo is not enough. Glover *v.* Black, 3 Burr. 1394, 1 W. Bl. 422; Robertson *v.* United Ins. Co., 2 Johns. Cas. 250; Jennings *v.* Ins. Co. of Penn., 4 Binn. 244, 251. The owner, however, of a ship, on which a bottomry bond has been given, may insure his interest generally. Kenny *v.* Clarkson, 1 Johns. 385. So, where a party purchased a vessel, not knowing that a bond had been given upon her, it was held, that he had an insurable interest. Williams *v.* Smith, 2 Caines, 13.

of insurance respecting fishing voyages, and inland navigation, for the substance of which we are indebted to the same valuable work. We shall also consider the law in relation to this subject more fully, in the subsequent chapter on Abandonment.

Many of the articles enumerated in the memorandum are called by ambiguous names. Thus, "corn"[1] means one thing in England, and another in this country; and it is not certain how much this word embraces, there or here. So "furs," "skins," and "hides,"[2] are discriminated by a line that is certainly obscure,

[1] In England, it has been held that malt, which is corn in a manufactured state, is included in the term corn, in the memorandum. Moody *v.* Surridge, 2 Esp. 633. So are peas. Mason *v.* Skurray, Marsh. Ins. 226, Park, Ins. 160. Rice, however, has been held not to come within the meaning of this term. Scott *v.* Bourdillion, 5 B. & P. 213. The above case of Mason *v.* Skurray, is cited in Hughes on Ins. 142, 2 Arnould Ins. 853, 2 Phillips, Ins. § 1764, and in Maude & Pollock on Shipping, 235, as deciding that peas *and beans* are included within the term corn. Mr. Marshall, on p. 223, note, makes mention of this case as follows: "The term, corn, comprehends every sort of grain, and also peas and beans. Vide Mason *v.* Skurray, *inf.*" On page 226, it is said that the insurance was on a cargo of peas. Mr. Park, on pages 149, and 160, cites the case in the same way as Mr. Marshall, on one page, as an authority that the word corn, includes peas and beans, and on the other, that the insurance was on peas. This case was decided in 1779, and Mr. Weskett, who wrote in 1783, says: "An action was brought against the defendant, to recover a loss on pease damaged very much by sea-water; and determined at Guildhall, Mich. 1799, that pease are to be considered as corn, or grain." Weskett on Ins. 389. Millar, also, who wrote in 1787, mentions peas, only. Millar, Ins. 358. The question is, however, one of not much importance, except in determining the precise point decided by the case alluded to; for pease and beans would doubtless be governed by the same rule, and Mr. Weskett, on page 146, mentions the following articles, as being enumerated in several English statutes relating to corn, namely: "wheat, rye, barley, oats, pease, beans, malt, pearl barley, or other corn, ground or unground, bread, biscuit, meal, and grain." In this country, the word, corn, is generally used in a more limited sense, and its meaning would depend very much upon usage.

[2] In Bakewell *v.* United Ins. Co., 2 Johns. Cas. 246, the word, skins, was held to include deer skins. In Astor *v.* Union Ins. Co., 7 Cow. 202, the policy contained the clause, "free from average on skins, hides, and other articles, perishable in their nature." At the time the insurance was effected, the invoice of the goods was presented, headed "invoice of furs," and describing the articles as skins of the bear, raccoon, opossum, deer, fine-fisher, cross-fox, martin, white raccoon, wild-cat, wolf, wolverine, panther, and cub skins. There was much evidence gone into, to prove that the term, "skins," was applied when the skin was the chief value, and that "furs," when the fur gave the article its value, and that furs were not perishable articles. A verdict being given for the plaintiff, the court refused to set it aside.

[illegible] and "[illegible]" [illegible] have given [illegible] decisions. [illegible] the decisions [illegible] from the [illegible]. The species of an article is [illegible] by the [illegible] nature. In regard to what articles are considered perishable from their own nature, it would [illegible] be [illegible] the same.

3. Of the Clause respecting Stranding.

As the memorandum articles are all of them of a perishable nature, and especially liable to a partial deterioration, insurers [illegible] that they [illegible] to protect themselves from liability for [illegible] to them, unless it was certain that this was not caused by [illegible] leaky or heavy. For this purpose, it was provided that the memorandum articles should be "free from average, unless general, or the ship be stranded."[1]

The original intention of this provision cannot be doubted. It was, that the insurers should not be held for any partial loss on these perishable articles, unless this was caused by a peril of

[illegible] was held not to be included in the term "salt." Journa v. Bourdieu, Marsh. Ins. 224, note. Park. Ins. 438.

[illegible] v. Commercial Ins. Co., 2 Cas. 243, where a usage being shown, that sarsaparilla is not considered a perishable article, it was held, not to come within the term "fruit." This word was considered by the experts to mean beans, onions, etc.

[illegible] De Peau v. Jones, 1 Brev. 417, dried prunes were held to be "fruit." The voyage was from Bordeaux to Charleston. Oranges also come within this term. Hamilton v. Union Ins. Co., 1 Mason, 429.

[illegible] Baker v. Ludlow, 2 Johns. Cas. 289, where the mention of "dry fish," was held to exclude "pickled fish."

[illegible] In Nelson v. La. Ins. Co., 17 Mart. La. 289, parol evidence was admitted to show whether flour was an article perishable in its nature. In Robinson v. Commonwealth Ins. Co., 3 Sumner, 220, and Williams v. Ohio, 16 Maine, 207, potatoes were held to be perishable articles. In Baker v. Ludlow, 2 Johns. Cas. 289, the court said: "The enlargement words, 'all other articles perishable,' etc., are not applicable to the articles previously enumerated, nor can they repel the implication arising from the enumeration of them."

[illegible] The memorandum clause was inserted in English policies in 1749, but the clause relative to stranding was struck out a few years afterwards, in the policies of the London Assurance, and the Royal Exchange Assurance Companies. See Stevens & Rowcroft on Average, Vol. 2d Ed. 395. The London Assurance Company has since reinserted it, and the Royal Exchange Assurance Company have modified the clause, so that it reads: "free from all average, etc., unless general, *or otherwise specially agreed.*" 2 Arnould, Ins. 852.

such a nature, as to exclude all probability that the loss was due to the nature of the goods. Such a loss it was intended to designate by the word "stranding;" and we may suppose the word to have been equivalent in the minds of those who first used it, to "wreck."

It seems certain that the insurers intended to say, that they should not be liable for a partial loss on these goods, unless the ship was stranded or wrecked, and the goods thereby injured. The courts did not, however, incline to this view, but adopted the more literal construction and interpretation of the phrase, and a meaning was given to it, which was far from that originally intended.

Thus, it seems now to be settled, that the phrase is to be read, as if it ran thus: "goods to be free, etc., *unless* the ship be stranded." And then this stranding is to be regarded as a condition, and if it takes place, the whole effect of the provision is exhausted, and the insurers are liable, *if there once be a stranding*, for any partial loss, in the same manner as if this provision had no existence. The reason given for this is, that in case of stranding and partial loss, it would be impossible, or very difficult at least, to say how much of the injury to the goods arose from their own perishableness, and how much from the stranding. This construction is now well settled; but we do not think that it rests on good grounds.[1]

[1] The first case after the clause was introduced, was in 1754, before Lord Chief Justice *Ryder*, Cantillon *v.* London Ass. Co., cited 3 Burr. 1553, where it is said the court "and a special jury looked upon this as a condition, and that by the ship's being stranded the insurer was let in to claim his whole partial average loss." In 1764, the question arose whether the exception, "free from average, unless general," let in a partial loss, where there was also a general average. Lord *Mansfield* said: "The insurer is liable to all losses arising from the ship being stranded, and in all cases where there is a general average; but all other partial losses are excluded by the express terms of the policy." Wilson *v.* Smith, 3 Burr. 1550.

The same reason would seem to apply here, as in the case of stranding, and the fact, that the insured was permitted to recover only the damage sustained by the general average, which ruling has not been controverted to this day, shows, we think conclusively, that the intention was to exclude all partial loss, except that sustained in consequence of a general average, and by stranding.

In 1790, came the *nisi prius* case of Bowring *v.* Elmslie, 7 T. R. 216, n., before Lord *Kenyon*, C. J. The insurance was on fish. Lord *Kenyon* charged that "the stranding of the ship, put the fish in the same condition as any other commodity not mentioned in the memorandum, and the underwriters were liable for all damage sustained by it; for

So, it is settled, that if there be a stranding, the insurers are liable, although the partial loss took place at a different time, from a different cause, and at a different place. Such, at least, is the law in England;[1] but some question exists, whether in this country, a construction would not be given to this clause, upon this point, more in harmony with the intention of those who originally used it. In this country, the question is not of so much importance, because the policies either provide that the loss shall happen by the stranding, or the clause in regard to stranding is struck out altogether. And in England, if the stranding take place after the memorandum articles have ceased to be at risk, and the adventure as to them has terminated, it is not a "stranding," within the policy.[2]

The phrase, "or the ship be stranded," is construed so far

otherwise, there would be very considerable difficulty in ascertaining how much of the loss arose by the perils insured against, and how much by the perishable nature of the commodity, which was the very thing the memorandum was intended to prevent." The defence in this case was two-fold: 1st. That the ship had been fraudulently stranded; 2d. That the damage to the fish was not occasioned by the stranding. The jury found for the defendant, on the ground, that the stranding was fraudulent.

The next case, in point of time, is Nesbitt *v.* Lushington, 4 T. R. 783, decided in 1792, where a mob came on board the vessel, and weighed anchor, upon which the vessel drove upon a reef of rocks and was stranded. The mob compelled the captain to sell all the cargo at a price less than its value, except about ten tons, which was damaged by the stranding, and was thrown overboard. It was held, that the insured could only recover for this portion, which was injured by the stranding. In Burnett *v.* Kensington, 1 Esp. 416, 7 T. R. 210, the vessel struck on a rock, but did not remain there, although several of her planks were started and water entered and damaged the cargo. She was afterwards voluntarily stranded by the captain, under the directions of a pilot, in order to save both ship and cargo. The ship sustained no damage from the stranding, and afterwards pursued her voyage with the greater part of the cargo. After several trials, the jury found that the ship was stranded, but that the damage did not arise in any way from it, and a verdict was found for the defendant. But the court held, that if the ship was stranded, this destroyed the exception and let in the general words of the policy. Lord *Kenyon*, speaking of Bowring *v.* Elmslie, and Nesbitt *v.* Lushington, said: "My two opinions that have been referred to, the one in the *nisi prius* case, and the other in Nesbitt *v.* Lushington, have no weight with me as judicial authorities, though I confess I have not been able to extricate my mind from the reasoning that led me to the conclusion in those cases."

[1] See 2 Arnould, Ins. 859.

[2] Roux *v.* Salvador, 1 Bing. N. C. 526. In this case, the goods were sold at an intermediate port, and the ship was afterwards stranded before reaching her port of destination. Held, that if there was not a total loss at the intermediate port, the subsequent stranding would not let in a claim for a partial loss. This case was afterwards reversed, but this position was not controverted. 3 Bing. N. C. 266.

strictly that no stranding, unless of the ship itself, — none therefore of a lighter in which the goods were passing to the shore, — is a "stranding" within the policy.[1]

But the cases have turned principally upon the meaning to be given to this word "stranding." Literally, its meaning is obvious enough. A vessel is stranded when she gets upon the strand, or shore. And as this occurs generally only when a vessel is wrecked, the word was used, as we have already intimated, in this sense.

It is not so now. Both in England and in this country, it seems to be settled, that if the ship be literally stranded, that is enough, without much reference to the length of time that she remains on shore, or any regard to the effect of this stoppage. It is true, that the courts say it is not enough that the ship did just "touch and go;" her course must be arrested, and all progressive motion must cease.[2] But if after a few minutes of delay upon the rock or strand, she is thrown off by wind or tide, or dragged off by human aid, still she was "stranded" within the legal meaning of the policy; and this, although neither ship nor cargo were at all injured.[3]

So she is "stranded" if she falls and rests on piles, or any artificial fabric, as much as if she lay on a rock, or a bank or

[1] Hoffman *v.* Marshall, 2 Bing. N. C. 383.

[2] Thus in Harman *v.* Vaux, 3 Camp. 429, Lord *Ellenborough*, C. J., said: "If the ship touches and runs, the circumstance is not to be regarded. Here she is never in a quiescent state. But if she is forced ashore, or is driven on a bank, and remains for any time on the ground, this is a stranding, without reference to the degree of damage she thereby sustains." And in M'Dougle *v.* Royal Exch. Ass. Co., 4 M. & S. 503, where the vessel rested but a minute and a half on the rock, it was held to be no stranding. Lord *Ellenborough*, C. J., said: "But I take it that stranding, in its fair legal sense, implies a settling of the ship; some resting, or interruption of the voyage, so that the ship may *pro tempore* be considered as wrecked." In the same case at *nisi prius*, 4 Camp. 283, he said: "*Ex vi termini* stranding means lying on the shore, or something analogous to that. To use a vulgar phrase, which has been applied to this subject, if there is 'touch and go' with the ship, there is no stranding." In Lake *v.* Columbus Ins. Co., 13 Ohio, 48, the insurers were not to be liable for any partial loss under seven per cent. unless it happened by stranding. The vessel struck on a rock or stump, by which a hole was made in her bottom and the goods were damaged. The vessel was not delayed, and the master finding she was sinking, run her ashore. Held that there was no stranding.

[3] A delay on a rock of fifteen or twenty minutes has been held to be a stranding. Baker *v.* Towry, 1 Stark. 436. So a delay of two hours on a bank. Harman *v.* Vaux, 3 Camp. 429.

the shore.[1] In one case it was held not to be a stranding where the vessel came into collision with another, and was forced ashore, where she remained an hour.[2]

It is not a "stranding" if she takes the ground in a tide harbor, in any usual way, and place, merely by the effect of the tides.[3] But if extraordinary circumstances or agencies mingle with these natural and customary events, and give to them their destructive or injurious efficacy, so that the vessel comes to the ground in an unusual and perilous way, this is then held to be a "stranding."[4]

[1] Dobson *v.* Bolton, Marsh. Ins. 239, Park, Ins. 148, n. The vessel in this case rested on the piles till they were cut away.

[2] Baring *v.* Henkle, Marsh. Ins. 240. It was contended, in this case, that it could only be a stranding where the ship was either cast on shore by the violence of the winds and waves, or run aground to avoid a greater danger, and this doctrine seems to have been assented to by Lord *Kenyon*, C. J.

[3] In Kingsford *v.* Marshall, 8 Bing. 458, 1 Moore & S. 657, the vessel entered a tide harbor, was moored as directed, and took the ground at low tide. This was held not to be a stranding, although in taking ground she struck against some hard substance, by which two holes were made in her bottom and her cargo was injured. In Hearne *v.* Edmunds, 1 Brod. & B. 388, the vessel was three days in going up Cork river. She took the ground every day, and on the third day was moored at the quay. When the tide ebbed, she took ground, made a list, and lay on her broadside two tides, in consequence of which the vessel and cargo were much injured. This was held not to be a stranding, being in the usual course of navigation. See the preceding note.

[4] The question how far the taking ground is extraordinary in its nature, is a difficult one, and has given rise to cases of great nicety in its application. Thus, where a vessel was fastened by a rope to the pier, in order that she might take the ground in an upright position, and the rope broke, in consequence of which she fell on her side and was bilged, it was held to be a stranding. Bishop *v.* Pentland, 7 B. & C. 219, 1 Man. & R. 49. See also, Carruthers *v.* Sydebotham, 4 M. & S. 77. So in Wells *v.* Hopwood, 3 B. & Ad. 20, where the ship, at the time the tide was about to fall, was hauled off from the wharf and fastened by a rope from an adjoining wharf, so that she could avoid a heap of rubbish which lay near her own wharf, and take the ground in safety, but there being a strong wind the rope stretched, and when the tide fell, one end of the vessel came upon the heap, in consequence of which her seams opened and the cargo was damaged, though when the tide rose the seams closed and no damage to the ship was apparent, it was held to be a stranding. In another case, the vessel was going through a canal, and it became necessary in order to repair a lock, that the water should be drawn off. The vessel was moored in what was thought to be a secure place, and one where vessels were usually placed when the water was drawn off. In taking ground the vessel struck on some piles which were not known to be there. This was held to be a stranding because, said *Abbott*, C. J., "We cannot suppose that these canals are so constantly wanting repair, as to make the drawing off the water an occurrence in the ordinary course of a voyage." And if a vessel is obliged to go into a tide harbor through necessity, as where she is driven in by a storm, this is so far out of the ordi-

And it has been held that if the vessel be stranded voluntarily, and of set purpose, this may be a stranding within the policy.[1] And we see no good reason why this should not be considered as a stranding to all intents and purposes, provided only that it be done in good faith, and in the exercise of a reasonable discretion.

In some policies, both in England and in this country, there seems to be some disposition to return to the original meaning of the provision, by using the word "bilging," with or instead of the word "stranding." We suppose this word to be the same with "bulge," and to mean that part of a thing which swells or protrudes out.[2] We should say that the bilge of a ship was that part where her bottom rounds or swells out; and that she is "bilged" in nautical phrase, when by some injury this part is broken so as to let in water. We place in our notes the only case which touches this question; and more adjudication is necessary to determine certainly the meaning of this word.[3]

C. *Of the Clause limiting the Liability of the Insurers to a certain Amount.*

It is not uncommon for policies, both in England and in this country, to contain a further clause, — which is also considered as a part of the memorandum, — that the articles therein enumerated shall be "free from average under five per cent.," or some other limitation.

nary course that the underwriters are liable for all damage sustained by taking the ground at the ebbing of the tide. Corcoran *v.* Gurney, 1 Ellis & B. 456, 16 Eng. L. & Eq. 215. And in Barrow *v.* Bell, 4 B. & C. 736, 7 Dowl. & R. 244, where the vessel in entering the harbor struck against the fluke of an anchor which did not retard her progress but caused her to spring a leak, and she was afterwards moored in deep water, but being in danger of sinking, was warped into shoaler water where she took ground, it was held to be a stranding. See the next note.

[1] Bowring *v.* Elmslie, 7 T. R. 216, note; Burnett *v.* Kensington, 7 T. R. 210.

[2] Worcester and Webster both give "bilge" and "bulge" as synonymous terms. And in Burnett *v.* Kensington, 7 T. R. 210, it was averred that the vessel was "stranded, *bulged*, and destroyed" by the perils of the sea.

[3] In Ellery *v.* Merchants' Ins. Co., 3 Pick. 46, it was held that there must be a breach in the vessel to constitute a "bilging," and that it was not enough that the vessel was thrown on her beam ends, and that the seams opened and water entered, but it was not decided in what part of the hull the breach must be.

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valuation; but if the articles are separately valued, a loss on one equal to the specified percentage on its value, renders the insurers liable.[1]

A similar question arises when a cargo consisting of bales, packages, or parcels of the same kind of goods, is insured against total loss only, or free from average under a certain per cent. In England the law seems to be that if the packages are separately valued, the insured can recover for all that are totally lost, but not otherwise.[2] It has been said that the rule is the same

[1] Ocean Ins. Co. *v.* Carrington, 3 Conn. 357. The question in this case arose in a suit on a premium note. The defendant refused to accept the policy and pay the note, on the ground that the policy was not made out in accordance with his order which was as follows: —

"On 26 horses valued at	$2,200	at 15 per cent.	$450		
and 20 oxen	"	"	800	policy	1
			$3,000		$451."

A policy was made out for $3,000 on stock, etc. The court were divided on the question whether the above order meant that the valuation should be separate, three judges being in favor of the proposition and two opposed to it, but no doubt was expressed as to the effect of it. But in Louisville M. & F. Ins. Co. *v.* Bland, 9 Dana, 143, this rule was not adopted, but it was held that in every case where there are several classes of goods, the value of the article lost is not to be compared with the value of the whole cargo, nor of the class, but of the species alone. Under this rule, if tin plates and sheet iron are warranted free from average unless general, and hardware and brass wire free from average under fifteen per cent., the underwriters are liable for a loss of the brass wire, equal to or exceeding fifteen per cent. of its value.

[2] Ralli *v.* Janson, 6 Ellis & B. 422, 36 Eng. L. & Eq. 198. In this case a number of bags of linseed, valued at a gross sum, were insured at and from Calcutta to London. Each bag was of the same size, and contained the same quantity of seed. On the voyage, a number of bags were thrown overboard, and others were utterly destroyed by perils of the sea. Held, that there being no separate valuation, or any other stipulation in the policy showing that it was intended to make a separate insurance upon each portion, the policy was on the whole of the seed, and the underwriters were not liable for a loss of part. This case has changed the rule as laid down by Mr. *Arnould*, 2 Arnould, Ins. 1038, which has been generally supposed to be the law in England. Mr. *Arnould* says: "It is an undoubted doctrine in the English law of marine insurance, that, if a cargo of perishable goods be made up of several distinct packages, each *capable* of a separate valuation, and one, or more, of these be entirely lost, there is an absolute total loss upon every such package, though the rest of the cargo may come to hand only partially damaged, and the whole may have consisted of articles warranted free from average." This doctrine was founded on the case of Davy *v.* Milford, 15 East, 559, and has been recognized in numerous cases. Lewis *v.* Rucker, 2 Burr. 1167; Hills *v.* London Ass. Co., 5 M. & W. 569; Hedbergh *v.* Pearson, Holt, N. P. 349, 2 Marsh. 432, 7 Taunt. 154; Cologan *v.* London Ass. Co., 5 M. & S. 447; Thompson *v.* Royal Exch. Ass. Co., 16 East, 214. Some of these cases have engrafted exceptions on the rule as stated by Mr. *Arnould*, but we do not

CHAPTER VIII.

OF DEVIATION.

SECTION I.

WHAT IS MEANT BY DEVIATION.

THE basis upon which the contract of Insurance, and all the law regulating that contract, rests, is, that the insurers agree to indemnify the assured against certain perils, in consideration of a premium paid by the insured, and, that the contract may be fair between the parties and useful to the commercial public, it is obvious that this premium must be adequate, or in due proportion to the risks. This, however, is impossible, unless the risks can be to a certain extent known beforehand, and therefore estimated. For this purpose, the voyage, where the insurance is upon a voyage, must be distinctly stated; and its course and termini being known, the insurers may then judge of the risks to be encountered on that voyage. If, however, the insured is to be at liberty to vary the voyage at his own pleasure or convenience, it is plain that he may vary the risks in the same, and then that the estimate of the insurers must be of no use. It is, therefore, a perfectly well-established rule of law, that the vessel must not *deviate from the proper course of the voyage*. But the principle on which this prohibition rests, extends to all other things which enter as elements into the calculation which determines the amount of premium. The result of this is, that although the "deviation" of insurance originally meant, no doubt, only a departure from the course of the voyage, it is now always understood in the sense of any material departure from, or change in the risks insured against, without just cause.

Nor is it necessary, that the change in the risks, should be an increase of them; it is enough, that the parties have agreed that the insurers shall assure certain risks, and no others; and the insured have no right to substitute any others, in the place of those assumed, whether they be greater or smaller.[1] For example, if goods are transshipped from one vessel to another, this is a change of risk, which discharges the insurers, without inquiry whether the new vessel be better or worse, than the old one.[2] In practice, however, it is generally true, as the cases in our notes to this chapter will show, that a slight change, which does not increase the risk, is not considered a deviation.

[1] In Maryland Ins. Co. *v.* Le Roy, 7 Cranch, 26, the vessel had liberty to touch at the Cape de Verd Islands for the purchase of stock, such as hogs, goats, and poultry, and taking in water. The judge in the court below instructed the jury, that the taking in four jackasses did not avoid the policy, unless the risk was thereby increased. The jury having found for the plaintiff, the judgment was reversed on account of the above ruling. Mr. Justice *Johnson* said: "The discharge of the underwriters from their liability in such cases depends, not upon any supposed increase of risk, but wholly on the departure of the insured from the contract of insurance. The consequences of such violation of the contract are immaterial to its legal effect, as it is, *per se*, a discharge of the underwriters, and the law attaches no importance to the degree, in cases of voluntary deviation." And Lord *Mansfield*, C. J., in a case where a ship had been turned into a factory-ship for the slave trade, said, in substance: The single point here is, whether there has not been what is equivalent to a deviation, whether the risk has not been varied? It is not material, whether or not the risk has been greater. If a ship insured for a trade, is turned into a floating warehouse, or a factory-ship, the risk is different, it varies the stay, for while she is used as a warehouse, no cargo is bought for her. Hartley *v.* Buggin, 3 Doug. 39. See also, Child *v.* Sun Mutual Ins. Co., 3 Sandf. 26.

So, where a vessel, insured from Gibraltar to the United States, with liberty to proceed to the Cape de Verd Islands for salt, arrived at the Isle of May, and found that there were so many vessels waiting, that her turn to load would not come for several weeks, but the governor of the island proposed that the captain should make a voyage to two of the other islands for provisions, and should load immediately on his return. This was done, and the vessel was loaded sooner than would otherwise have been the case. The intermediate voyage was, nevertheless, held to be a deviation. Kettell *v.* Wiggin, 13 Mass. 68. See also, Robertson *v.* Col. Ins. Co., 8 Johns. 491.

[2] Emerigon, c. 12, § 16, Meredith's Ed. 339; Bold *v.* Rotheram, 8 Q. B. 797. And in Winthrop *v.* Union Ins. Co., 2 Wash. C. C. 7, 20, where part of the cargo insured was taken out and sold under pretence that the ship was overladen, and a lighter cargo bought and put on board, Mr. Justice *Washington* said: "The changing of the cargo was sufficient to avoid the policy, if, under the circumstances of the case, it were imputable to the plaintiff. The reason is not, that the risk insured is increased, but that it is not the risk insured; and therefore it could be no excuse to say, that the load was lightened by the change. If a necessity exists to throw overboard, or to land a part of the cargo, the act of doing so may be excused, but in this case, there is no evidence of any necessity to lighten the vessel."

Nor is the question, whether such a change is a deviation or not, that is, whether it proceeded from a sufficient cause or not, to be judged of by the event. For this might show that no necessity really existed, although any prudent man would have believed at the time, that circumstances required or compelled the change that was made; or, it might make it evident, that an apparently slight cause for change, too feeble to be at all considered by any person of intelligence, did in fact, by means of the change which it produced, save the vessel from great but unknown dangers. The rule, therefore, is, that the necessity for the change, or the justification of it, must be judged of and determined by the circumstances of the case, as, at the very time, they came or could come before the consideration of the assured or his representative.[1]

There may be a deviation while the ship is in port;[2] and a deviation where the insurance is on time, no voyage being indicated.[3] And it may be added, that as the reason of this rule

[1] Byrne *v.* La. State Ins. Co., 19 Mart. La. 126; Gazzam *v.* Ohio Ins. Co., Wright, [illegible]. And in Stewart *v.* Tenn. Mar. & F. Ins. Co., 1 Humph. 242, it was held, that though generally it would be a deviation to lash a flat-boat, descending the Mississippi laden with produce, to a steamboat to be towed, yet, if the flat-boat had been damaged by a collision, and the master, believing the danger to be imminent, should cause his boat to be taken in tow, although this enhanced the danger and contributed to the loss, yet if it was honestly intended by the master for the preservation of the boat, the underwriters were liable. The same principle was established in Gazzam *v.* Ohio Ins. Co., *supra*, where a steamboat, while being moved from a wharf to her landing place, by a line and yawl, steam not being up, was struck by a sudden flaw of wind and thrown upon some rocks. The court held, that if there was a usage in respect to the mode of moving a steamboat from one wharf to another, the master was bound to follow it, and a variation from it would be a deviation, but if there was no usage, and the master acted honestly in moving the boat in the manner described, it was no deviation, though other masters, of equal ability and fairness, stated that they would have acted differently under the same circumstances.

[2] Gazzam *v.* Ohio Ins. Co., Wright, 202. See also, note *supra*. In —— *v.* Westmore, 6 Esp. 109, the vessel was insured "during one month's remaining in Portsmouth harbor, securely moored." The vessel was moved twice. Lord *Ellenborough* held, that this did not change the risk. So, in Bell *v.* Western Mar. & F. Ins. Co., 5 Rob. La. 423, where the marshal of a court in which the vessel had been libelled, removed her from one side of the river to the other, and there kept her, the underwriters were held liable, there being no proof that the risk was at all increased.

[3] See cases in the preceding note. In Stuart *v.* Columbian Ins. Co., 2 Cranch, C. C. 442, a vessel was insured for six months, and described in the policy as "now bound on

applies to all navigation, so does the rule itself, and the law of deviation is in full force in reference to all river and lake navigation.[1]

SECTION II.

OF THE EFFECT OF A DEVIATION.

It is perfectly well settled, that any deviation whatever discharges the insurers from all further responsibility; leaving them, however, liable for any loss occurring before the deviation, and caused by a peril insured against.[2] Nor are they discharged, if the change of risk is merely temporary, and when it ceases, all subsequent risks are precisely and certainly the same as they would have been had no deviation taken place. In this case, the effect of the deviation is only to suspend the responsibility of the insurers, and discharge them from any liability for a loss, which occurs during the existence of the deviation. But it is obvious, that there are very few changes of risks, that can be said to leave all the subsequent perils in precisely the same condition as if there had been no change; and this exception, therefore, is seldom applicable.[3]

a voyage from Georgetown to Madeira and a market, between Finisterre and Naples, with liberty, after the expiration of six months, to freight or trade for six months more," at an additional premium. Held, that the policy for the second six months, was on time only, and that the vessel had a right to go to Brazil during that time.

[1] Hermann *v.* Western Mar. & F. Ins. Co., 13 La. 516; Gazzam *v.* Ohio Ins. Co., Wright, 202; Jolly *v.* Ohio Ins. Co., Wright, 539; Bell *v.* Western F. & M. Ins. Co., 5 Rob. La. 423; Natchez Ins. Co. *v.* Stanton, 2 Smedes & M. 340.

[2] Hare *v.* Travis, 7 B. & C. 14; Richardson *v.* Maine F. & M. Ins. Co., 6 Mass. 102.

[3] Mr. Justice *Sedgwick*, in delivering the opinion of the court, in Coffin *v.* Newburyport Mar. Ins. Co., 9 Mass. 436, 449, said: "It is undoubtedly true, that the shortness of the time, or the distance of a deviation, makes no difference as to its effect on the contract. Whether for one hour or one month, or for one mile or one hundred miles, the consequence is the same. If it be voluntary and without necessity, it puts an end to the contract." But it is obvious, that in some cases there may be a temporary deviation, which would exonerate the underwriters for loss during such deviation, but not for a subsequent loss. Thus, if a steamboat which makes regular trips between two

SECTION III.

WHAT IS A DEVIATION FROM THE PROPER COURSE OF A VOYAGE.

The deviation which is most usual, is a departure from the proper course of the voyage; and that is the most proper course, which is the usual course, if there be a usage in this respect. This is a question of fact. No master of a ship is bound to go just where one, two, or three who have preceded him, chose to go. Nor is he, indeed, entitled to do this, if it be out of the direct course of the voyage.[1] But if the usage is made out, it will justify the departure.[2] The criterion is this; has the customary course of ships on that particular voyage, been so long established and so well known, that the insurers are justified in calculating upon that course, as the one the ship will, if possible, pursue. If there be no such usual course, then the master is bound to proceed to the destined terminus in the most natural, direct, safe, and advantageous way.[3]

ports, is insured for one year, and if, after the trip for the day is ended, she should tow a vessel or do any other similar act, the underwriters would clearly be liable, if she were subsequently lost on a regular trip or while lying in port, but not if she were lost while engaged in towing.

[1] Martin *v.* Delaware Ins. Co., 2 Wash. C. C. 254. See also, Folsom *v.* Merchants' Mut. Mar. Ins. Co., 38 Maine, 414.

[2] Bentaloe *v.* Pratt, J. B. Wallace, 58; Kettell *v.* Wiggin, 13 Mass. 68. So a vessel, on whose cargo insurance has been made, may stop in descending a river for the purpose of taking in further cargo, or passengers, if such stoppages are conformable to the usages of trade, and are of no unusual length. Lockett *v.* Merch. Ins. Co., 10 Rob. La. 339. But a usage of this nature, seems to have been disregarded in Eliot *v.* Wilson, 4 Brown, P. C. 470. In Mey *v.* South Carolina Ins. Co., 3 Brev. 329, the underwriters refused to insure a vessel at and from Amsterdam, but afterwards insured it from Amsterdam. It was then the custom, of vessels of a certain tonnage, to take in part of their cargo at Amsterdam, and the rest at the Texel, one hundred miles distant. The vessel sailed from Amsterdam, but while lying in the Texel, waiting for cargo, was damaged by a storm, and the underwriters were held liable.

[3] Martin *v.* Delaware Ins. Co., 2 Wash. C. C. 254. The voyage in this case, was "at and from Kingston, in Jamaica, to the Island of Aruba, and at and from thence back to Kingston, with liberty to touch at Rio de la Hache." Permission was afterwards given to take in the whole or any part of the cargo at Coro. The vessel sailed for and

If a reasonable usage requires that a master, on reaching a certain point, should then and there decide on consideration of the winds and currents and other circumstances as then existing, which of two or more routes is the best, and he, without so deciding, takes one of them in obedience to the sailing orders of his owners, this would be a deviation. For the insurers have not only a right to this exercise of his judgment, but a right to consider, when they estimate the risk, that he will be in entire liberty when he reaches that point to take what seems the best course.[1]

It must not be inferred, however, that if a master honestly mistakes the course, when one is marked out by usage, that is no deviation. For where there is a course so prescribed and defined, the assurers have a right to require, that the master shall know it, and shall follow it.[2] But if no course be in this way

arrived at Aruba, sailed thence for Coro, took in part of her cargo and then returned to Aruba, and was captured while in that port. Held, that the return from Coro to Aruba, was a deviation. So, where a vessel on a voyage from one port to another, puts into an intermediate port. Fox *v.* Black, Park, Ins. 387; Townson *v.* Guyon, Park, Ins. 388; Salisbury *v.* Townson, Millar, Ins. 418, Park, Ins. 411. And in Brown *v.* Tayleur, 4 A. & E. 241, 5 Nev. & M. 472, where a vessel, insured "at and from her port of lading in North America to Liverpool," took in part of her cargo at Cocagne, New Brunswick, and then sailed to Buktouche, seven miles distant, and not in a line from Cocagne to Liverpool, where she took in the rest of her cargo, then returned to C., took in her stores and sailed for L., the voyage from C. to B. was held to be a deviation. Both of these ports were within the jurisdiction of the custom-house at St. Johns, New Brunswick.

[1] Middlewood *v.* Blakes, 7 T. R. 162. See this case stated at length, ante, page 176, n. 3.

[2] Phyn *v.* Royal Exch. Ass. Co., 7 T. R. 505. In this case, the jury found that the deviation was owing, either to the ignorance of the captain, or to something else, but that it was not fraudulent. Held, that the underwriters were not liable. This question was much considered in the case of Brazier *v.* Clapp, 5 Mass. 1. The vessel was insured on a voyage from Boston to New Orleans, and back. It appeared by the log-book, that when the ship was up with Cape Cod, the captain ordered the ship to be hauled up for Nantucket, intending to go through the Vineyard Sound. It was proved at the trial, and the jury so found, that the usual route was by the south channel. The judge charged, that if there had been a departure from the usual course, they should find whether it was from necessity or *mistake*, in either of which cases, they should find for the plaintiff. The jury being unable to agree, they were further instructed, that they should find merely whether the deviation was through necessity. A verdict being rendered for the defendants, the plaintiff excepted. In delivering the opinion of the court, *Sedgwick*, J., said: "A general position, that the mistake of the captain, under no circumstances, forms an excuse for a deviation, is certainly not true. The most

determined, then they can only require that the master shall find, as well as he can, what is the proper course, that is, the most direct course that is safe, and if he takes the course which he judges to be this, it is no deviation, although he ought to have judged differently. If, indeed, he wanders so widely, that no master of ordinary skill, sense, or knowledge, could have done so, this is a deviation; because, it is always beyond the bounds of choice and reasonable possibility, which the insurers ought to have contemplated in calculating the risks upon an unusual voyage.

As touching at a port, not in the course of the voyage, is a deviation, so, *a fortiori*, is an intermediate voyage;[1] but a usage may exist, which will justify either of these things.[2]

Even a slight deviation, or what might seem to landsmen a very slight deviation, may suffice to discharge the insurers, as many cases show. Doubtless, the common rule, that the law "de minimis non curat," would apply here as elsewhere. But if it be a deviation, for a vessel to go designedly and unnecessarily an hour out of her course, or to lie by a ship for that time, only to save endangered property, it is obvious, that any *actual and substantial* change of risk is a deviation, although it be a very small one.[3]

An unreasonable and unnecessary delay in commencing a voyage, where the risk begins with the sailing of the vessel from

skilful, discreet, and prudent master may, and probably in almost all long voyages does commit mistakes, by which his ship may be taken out of the most direct and shortest course. Such is not a deviation that will discharge the underwriters. On the contrary, I believe, that in all instances, where a captain of ordinary skill and discretion, forms the best judgment he can under the existing circumstances, for the interest of all concerned, the contract of insurance remains unimpaired by his pursuing that judgment. But, in this case, before the charge of the judge was given, of which the plaintiffs complain, it was ascertained by the jury, that the route pursued was not the usual course, and that it was less safe than that which was departed from: and this at the commencement of a voyage, when every necessary information might be easily obtained." The verdict for the defendants was accordingly sustained.

[1] Kettell *v.* Wiggin, 13 Mass. 68.

[2] As in the Newfoundland trade. Vallance *v.* Dewar, 1 Camp. 503; Ougier *v.* Jennings, 1 Camp. 505, n. So, in the East Indian. Salvador *v.* Hopkins, 3 Burr. 1707; Gregory *v.* Christie, 3 Doug. 419; Farquharson *v.* Hunter, Park, Ins. p. 67.

[3] See ante, page 278, note 3, and post, in regard to saving property.

the port,[1] or a similar delay in port, where the insurance is "at and from" a port,[2] and the risk has commenced, or an unusual, extraordinary, and unnecessary extension or protraction of a voyage, either at sea or in a foreign port, is a deviation, because

[1] Where the insurance was "from" a port, it was held, that a delay of six months after the policy was made, it not appearing that the vessel was detained by fraud or any sinister design, nor that the risk was thereby enhanced, was not a deviation, the jury having found that the delay was not unreasonable. Earl *v.* Shaw, 1 Johns. Cas. 313. But see Himely *v.* S. Car. Ins. Co., 3 Const. R. 154. In Driscol *v.* Passmore, 1 B. & P. 200, a vessel having sailed on a voyage from Lisbon to Madeira, from Madeira to Saffi on the coast of Africa in ballast, and from thence back to Lisbon, a policy of insurance on the freight of the voyage from Saffi to Lisbon was obtained on the representation, that the vessel had arrived at Madeira and was about to proceed on her voyage immediately. On the arrival of the vessel at Madeira, all the crew except two, being alarmed by reports that some Moorish cruisers were off Saffi, left the ship and refused to return, unless the captain would sail immediately for Lisbon. On the arrival of the vessel at Lisbon, the charterers insisted on the captain's proceeding directly to Saffi, which he did, and the vessel was lost on the return voyage from Saffi to Lisbon. The underwriters were held liable.

[2] Chitty *v.* Selwyn, 2 Atk. 359; Hull *v.* Cooper, 14 East, 479; Hartley *v.* Buggin, 3 Doug. 39; Seamans *v.* Loring, 1 Mason, 127; Himely *v.* S. Car. Ins. Co., 3 Const. R. 154; Palmer *v.* Marshall, 8 Bing. 79. In this case, insurance was effected on the yacht Ruby, "at and from Bristol to London." The policy was dated Jan. 28, 1831. The yacht remained at Bristol till the 17th of the following May, when she commenced her voyage. The plaintiff was nonsuited, on the ground that the delay to sail amounted to a deviation or variance of the risk. On a motion for a new trial, 8 Bing. 317, *Tindal*, C. J., said: "What I have to consider, therefore, is whether any facts have been stated by the plaintiff, to account for this delay. I find none suggested, beyond the circumstance that this vessel was described as a yacht upon the policy, and that yachts are usually laid up in winter. But if the plaintiff meant to rely on that, he should have taken a policy adapted to his purpose. He might have insured his vessel in port for a definite time, and on the voyage to be commenced afterwards." In a subsequent action against another underwriter on the same policy, Palmer *v.* Fenning, 9 Bing. 460, it appeared, in addition to the facts above stated, that at the date of the policy and subsequently, the yacht was put up for sale at Bristol, and that the master proceeded from London to Bristol and fitted out the vessel for the voyage, a few days only before she sailed. The jury found for the plaintiff, on the ground that the delay was reasonable, as yachts did not usually sail in winter. The verdict was set aside and a new trial granted, on the authority of Palmer *v.* Marshall. See also, Mount *v.* Larkins, 8 Bing. 108. In this case, the insurance was on a vessel "at and from Sincapore to the ship's port of discharge in Europe." Owing to a delay on the outward voyage to Sincapore, she did not arrive at that port till the 30th of March, and sailed from thence on the 3d of May. The jury found that there was unreasonable and unjustifiable delay between the making of the policy, and the commencement of the risk. It was therefore held, that the underwriters were discharged. This case is cited and the doctrine approved of, by *Parke*, B., in Small *v.* Gibson, 16 Q. B. 141, 3 Eng. L. & Eq. 299, 306.

it is certainly a change, and indeed an increase of the risk.[1] And if goods are insured until safely landed, an unusual and unnecessary delay in discharging them will exonerate the insurers.[2] But the mere lapse of time is no proof of such a deviation. It enters importantly into the question, and is, indeed, the basis of it. But this question is, as in all cases of deviation, has there been any voluntary, extraordinary delay, not justified by necessity, or any thing equivalent to necessity?[3]

[1] Hamilton *v.* Sheddon, 3 M. & W. 49. The jury found in this case, that a delay of thirteen months at Benin, in Africa, was unreasonable, and the court refused to set the verdict aside. See Murden *v.* South Carolina Ins. Co., 3 Const. R. 200; Coffin *v.* Newburyport Mar. Ins. Co., 9 Mass. 436. In Williams *v.* Shee, 3 Camp. 469, goods on board a vessel were insured "at and from London to Berbice, with liberty to touch and stay at any ports and places whatsoever and wheresoever, and for all purposes whatsoever, particularly to land, load, and exchange goods, without being deemed a deviation." The vessel sailed with a fleet under convoy. On arriving at Madeira, she put in there to land some goods and was detained till after the convoy sailed, and was subsequently captured. Held, that this was a deviation. So, if a vessel which has been captured remains, after her release, in the port to which she has been carried by her captor, longer than is necessary to prepare for her voyage, this is a deviation. Kingston *v.* Girard, 4 Dall. 274. In Inglis *v.* Vaux, 3 Camp. 437, the ship was insured at and from Liverpool to Martinique, and all or any of the windward islands. Most of the outward cargo was disposed of at Martinique, with the rest, the captain sailed for Antigua, where he remained eight days, partly to dispose of the outward cargo, and partly to procure a homeward one. Lord *Ellenborough*, C. J., held, that as soon as the disposal of the outward cargo ceased to be the sole reason of his stay at Antigua, the underwriters were discharged. But if the delay had not been increased by the endeavor to procure a homeward cargo, we think it clear that the underwriters should have been held responsible. In Upton *v.* Salem Comm. Ins. Co., 8 Met. 605, 611, Mr. Justice *Wilde*, speaking of this case, said: "For aught that appears in the report of the evidence, the remnant of the outward cargo might have been disposed of immediately on the arrival at Antigua, if the vessel had not been detained for the purpose of procuring a homeward cargo. On no other principle can the decision in that case be maintained." In Warre *v.* Miller, 4 B. & C. 538, 7 Dow. & R. 1, insurance was effected on freight, at and from Grenada to London. The vessel sailed, and arrived at Grenada, discharged part of her cargo at three different bays, and was going to the fourth to discharge the remainder, and to take in part of her homeward cargo, when she was lost. The underwriters were held liable.

If the insurers know that the vessel they are insuring, is to sail in company with another, and that they are not equally fast sailers, the vessel insured may delay a reasonable time for the other, if they are separated on the voyage. Coles *v.* Marine Ins. Co., 3 Wash. C. C. 159.

[2] Parkinson *v.* Collier, Park, Ins. 416. See Noble *v.* Kennoway, 2 Doug. 510.

[3] Langhorn *v.* Allnutt, 4 Taunt. 511; Cleveland *v.* Union Ins. Co., 8 Mass. 308, 318. In Grant *v.* King, 4 Esp. 175, insurance was made on an American vessel, at and from Brest to London against British captures. The policy was taken out in

Going into a port which did not belong to the established, or the natural and proper voyage, is certainly a deviation; and, in

August, but the vessel did not sail till the month of March following. The port of Brest was blockaded by an English squadron, and the master was obliged to go to London to procure American sailors to navigate the vessel. The underwriters were held liable. Lord *Ellenborough* said: "To discharge the policy, there must be a clear imputation of waste of time. Mere length of time elapsing, between the sailing of the vessel, and the underwriting of the policy, is not of itself sufficient to avoid the policy; it is capable of explanation." So, where the insurance was "at and from Pillau," and the vessel arrived there in an unseaworthy condition, and was detained some time for repairs. Smith *v.* Surridge, 4 Esp. 25. Lord *Tenterden*, in Bain *v.* Case, 3 Car. & P. 496, left it to the jury to decide, whether the delay of one hundred and nine days in port, was unreasonable, the captain having stated that he remained there with the hope of getting permission to land his cargo, as negotiations were then pending with the government for that purpose. In Suydam *v.* Mar. Ins. Co., 2 Johns. 138, a delay of twenty days at the port of destination, for permission to enter, was held not unreasonable, the master having reason to believe that a permission to enter would be granted. In Col. Ins. Co. *v.* Catlett, 12 Wheat. 383, *Story*, J., said: "A delay which is necessary to accomplish the objects of the voyage, according to the course of the trade, if *bonâ fide* made, cannot be admitted to avoid the insurance." And, it was held, that a delay for the purpose of selling the cargo was not a deviation, although the delay was owing to the master being instructed not to sell the cargo at less than a specified price. But, said *Story*, J., "if the owner should limit the price to an extravagant sum, or the master should delay after all reasonable expectations of a change of market were extinguished, such circumstances might properly be left to a jury to infer a delay amounting to a deviation." And in Gilfert *v.* Hallet, 2 Johns. Cas. 296, a delay of nineteen weeks for the purpose of selling the cargo, and the remaining three days off another port to inquire about a market, were held not to be deviations. So, in Phillips *v.* Irving, 7 Man. & G. 325, where the ship was insured "at and from London to Bombay, and thence to China, and back to the United Kingdom, with liberty to touch, stay, and trade at all ports and places on this side, at or beyond the Cape of Good Hope," a delay of seven months was held not to be unreasonable, under all the circumstances of the case. The first three months were taken up in getting the vessel repaired. The rest of the time was occupied in seeking for a cargo, which could not be obtained. *Tindal*, C. J., delivering the opinion of the court, said: "It may be collected from numerous cases, that delay before or after the commencement of a voyage insured, is not equivalent to a deviation, unless it be unreasonable. And we think, that no certain and fixed time, can be said to be a reasonable or unreasonable time for seeking a cargo in a foreign port; but that the time allowed, must vary with the varying circumstances, which may render it more or less difficult to obtain such cargo." In Oliver *v.* Maryland Ins. Co., 7 Cranch, 487, insurance was effected "at and from Baltimore to Barcelona, and at and from Barcelona back to Baltimore." A usage of trade was proved, that vessels might take in part of their cargoes at Barcelona, and then go to Salou, about sixty miles further south, and take in the rest. The majority of the court were of the opinion, that although the vessel might remain at Barcelona during the time usually employed in loading a cargo, yet, when this time was exhausted, she could not sail for Salou.

And a delay of five months to claim a cargo, which had been seized by government,

fact, a very common one. So, is the entering into a port which does belong to the voyage, but, by the usual course of it, should not have been entered at that time, or in that order. The questions which cases of this kind usually present, are these. In the first place, did the port belong to the voyage, according either to the established usage, or the reason of the thing? If it did not, was the entering into it for a good and sufficient cause? In the next place, if the port did belong to the voyage, in what order, or succession, as to other ports, did this come, if the voyage required that it should be entered.

SECTION IV.

OF LIBERTY POLICIES.

Most of the preceding questions frequently occur under liberty policies, as they are sometimes called; or policies in which the assured expressly stipulate for liberty to do certain things which they could not do without deviation, or a change of risk, unless the insurers give them this liberty. Such expressions therefore often occur, as "with liberty to enter the port of ——," being some place off the course, and which the ship therefore could not otherwise have visited. Now, such a liberty is construed strictly. A vessel that has liberty to "enter" or "touch at"

was held not to be a deviation. Stocker *v.* Harris, 3 Mass. 409. And, in another case, where the master, being directed to take his vessel into the king's dock at Deptford, moored her near the dock gates, and no order for her admission being received, remained there from the 18th to the 27th of February. The order for admission arrived on the 21st. The jury having found, that the delay was not owing to the fact that the order for admission was not received before, but was caused by a quantity of ice in the river, the underwriters were held liable. Samuel *v.* Royal Exch. Ass. Co., 8 B. & C. 119.

In Schroder *v.* Thompson, 7 Taunt. 462, 1 J. B. Moore, 163, a vessel was chartered on a voyage to Norfolk, in Virginia, with liberty to call at St. Ubes and take in a cargo of salt, and to bring home a return cargo of timber. She entered Norfolk, with the salt on board, during an embargo, under which permission was given to return with the cargo which she then had on board, or in ballast. The captain, however, remained there eighteen months, till the embargo ceased, then shipped his homeward cargo, sailed, and was lost. The underwriters were held liable.

risk.[1] Thus, liberty to touch at a port for any purpose whatever, is said to include liberty to touch there for the purpose of taking on board part of the goods insured.[2] And if liberty is

from Antigua to England, with liberty to touch at all or any of the West India islands, Jamaica included," the vessel went to St. Kitts and remained there two months taking in cargo. It was contended that this was a deviation, but *Gibbs*, C. J., held that the whole scope of the policy showed that the vessel might go from island to island seeking freight, and added: "What could be the object of the liberty given her to touch at Jamaica, if she could not stay there to take in goods? Was she to go five hundred miles out of her way for the mere pleasure of viewing that island, and asking for news." See also, Ashley *v.* Pratt, 16 M. & W. 471, 1 Exch. 257; Gilfert *v.* Hallet, 2 Johns. Cas. 296. And in Chase *v.* Eagle Ins. Co., 5 Pick. 51, where goods were insured from New York to Lynn, the vessel having liberty to call at Newport, at which place the deck load was discharged, this was held not to be a deviation.

[1] As where the vessel is at a port belonging to the voyage. Cormack *v.* Gladstone, 11 East, 347; Laroche *v.* Oswin, 12 East, 131; Ashley *v.* Pratt, 16 M. & W. 471, 1 Exch. 257; Thorndike *v.* Bordman, 4 Pick. 471. So, if the vessel puts into port through necessity, she may discharge or take in cargo there, provided the risk is not thereby increased. Raine *v.* Bell, 9 East, 195; Chase *v.* Eagle Ins. Co., 5 Pick. 51, 53. So, where a vessel was driven from her loading port to another, and not being able to return, completed her loading at the latter port. Delaney *v.* Stoddart, 1 T. R. 22. Or where a vessel deviated to save life on board, and at the port of necessity took in additional cargo. Perkins *v.* Augusta Ins. & Banking Co., Sup. Jud. Ct., Mass., Nov. T. 1855. In this case, *Merrick*, J., stated the law as follows: "If a ship under the terms of a policy, or for any sufficient legal cause, is justified in originally entering into the port, her subsequent trading by breaking bulk, loading or unloading, during the period of her lawful stay and detention there, although such trading, loading, and unloading, are foreign to the main purpose of the adventure, or not specifically provided for by the terms of the policy, will not be held to amount to a deviation. But it would be otherwise, if those caused additional delay, or otherwise substantially enhanced or varied the risk." In Kane *v.* Columbian Ins. Co., 2 Johns. 264, there appears to have been a necessity for selling the cargo, and the case may not therefore be an authority in point. In Kingston *v.* Girard, 4 Dall. 274, it was held that a ship detained in port by captors, might trade. So in Hughes *v.* Union Ins. Co., 3 Wheat. 159, where the vessel had liberty to stop at a port to ascertain whether there were any men of war off her port of destination. In Lapham *v.* Atlas Ins. Co., 24 Pick. 1, it was held that a vessel insured to a port of discharge in the United States, might put into port to inquire for a market, and while there, might take a cargo for the port of destination. In Raine *v.* Bell, 9 East, 195, the insurance was on the ship and freight, and Lord *Ellenborough*, C. J., said: "I reserve giving any opinion as to the operation of a change in the state of the cargo in the case of a policy on goods; because the taking in of other goods in the course of one entire voyage, where it is not provided for, may be contended to constitute a different adventure from that on which the ship started with her original cargo." But in Laroche *v.* Oswin, 12 East, 131, the insurance was on goods, and this was held to make no difference. So, in Thorndike *v.* Bordman, 4 Pick. 471; Chase *v.* Eagle Ins. Co., 5 Pick. 51.

[2] Violett *v.* Allnutt, 3 Taunt. 419; Hunter *v.* Leathley, 10 B. & C. 858, 7 Bing. 517.

given to stop at all places, or specified places, for trade, refreshment, and recruiting, the vessel is not thereby deprived of her right to stop at other places for purposes connected with the voyage.[1] So if liberty is given to stop at a port to ascertain whether there are any hostile men-of-war off the port of destination, the vessel may remain at that port until the danger has passed away.[2]

It seems to be clear, that the most general liberty of touching, or staying at any port or ports, with or without naming them, must be construed in reference to the voyage itself, and is so far limited that it will not justify an entrance into any port, if it has no connection with the purposes of the voyage.[3] Nor

[1] Child *v.* Sun Mut. Ins. Co., 3 Sandf. 26. The vessel in this case was insured on a whaling voyage by a policy containing this clause. It was held that this did not prevent her from entering bays, or touching and staying at islands for the purpose of taking whales or sea elephants, if these were shown to be the proper purposes of a whaling voyage.

[2] Hughes *v.* Union Ins. Co., 3 Wheat. 159.

[3] Hammond *v.* Reid, 4 B. & Ald. 72. The vessel, in this case, put into port to learn the state of the market with reference to another adventure. It was held to be a deviation. So where a ship was insured "at and from London to Berbice, with liberty to touch and stay at any ports and places whatsoever and wheresoever, and for all purposes whatsoever, particularly to land, load, and exchange goods," Lord *Ellenborough*, C. J., said: "The liberty in the policy must be construed with reference to the main scope of the voyage insured." Williams *v.* Shee, 3 Camp. 469. In Solly *v.* Whitmore, 5 B. & Ald. 45, insurance was effected on a vessel "at and from Hull to her port or ports of loading in the Baltic sea and gulf of Finland, with liberty to proceed to, and touch and stay at, any port or ports whatsoever for any purpose, particularly at Elsinore, without being deemed a deviation." The vessel, loaded with goods for Elsinore, Dantzic, and Pillau, which last was her intended port of loading, sailed and delivered the goods at Elsinore and Dantzic, and was lost on the voyage to Pillau. *Abbott*, C. J., delivering the opinion of the court, said: "The liberty given by this policy to touch at any ports for all purposes, must be construed to mean purposes connected with the voyage. Here the voyage was from Hull to a loading port in the Baltic, and if the ship had gone to Elsinore or Dantzic to see if she could get a cargo, that would have been a purpose connected with the voyage, and consequently would not have been a deviation. But the vessel, in fact, went to those ports for the purpose of delivering goods, which was wholly unconnected with the object of the voyage insured. I am therefore of opinion that this was a deviation." See also, Clason *v.* Simmonds, cited 6 T. R. 533; Langhorn *v.* Allnutt, 4 Taunt. 511. In Rucker *v.* Allnutt, 15 East, 278, the policy gave the vessel liberty to touch and stay at any ports and places *for all purposes* whatsoever. Afterwards there was a clause making it lawful for the ship to proceed, sail to, and touch and stay at any ports and places whatsoever or wheresoever, particularly with leave to wait for information *off* any ports or places. The port of discharge was any port or place in the Baltic. It was held that the vessel might wait either in or off ports for the purpose of obtaining information.

will a liberty to touch at ports, without naming them, justify the master in wandering more widely from his course, than a reasonable interpretation of such a liberty will permit.[1] So

[1] In Bottomley *v.* Bovill, 5 B. & C. 210, the ship was insured from London to New South Wales, and at and from thence to all ports and places in the East Indies or South America, with liberty for the said ship to proceed, sail to, touch at and stay at any ports or places whatsoever, with leave to take in and discharge goods and passengers to all ports and places in the Channel, Cork in Ireland, Madeira, Cape of Good Hope, St. Helena, and wheresoever the ship might proceed to, as well on this as on the other sides of the Capes of Good Hope and Horn, and for all purposes whatsoever; particularly to trade and sail backwards and forwards, and forwards and backwards. The court held that the voyage insured was from London to New South Wales, and thence to South America or the East Indies, and that although the words above cited, would allow of intermediate voyages, yet only such as were undertaken with a view to an accomplishment of one or other of the voyages pointed out by the policy. So in Hogg *v.* Horner, Park on Ins., 394, where a ship was insured "at and from Lisbon to a port in England, with liberty to call at any one port in Portugal for any purpose whatever," it was held that this would not authorize a voyage from Lisbon to Faro, to complete the loading of the ship, Faro being to the southward of Lisbon and out of the course from Lisbon to England. And in Ranken *v.* Reeve, Park on Ins., 8th Ed. 627, where a ship was insured at and from Africa to the Canaries, Madeira, and Lisbon, with liberty to touch, stay, and trade at all ports, in the voyage, it was held that after the inception of the risk in Africa, the vessel could proceed only to the northward towards Europe, and not to the southward. In Lavabre *v.* Wilson, 1 Doug. 284, the voyage was described in these words: "At and from Port L'Orient to Pondicherry, Madras, and China, and at and from thence back to the ship's port or ports of discharge in France, with liberty to touch in the outward or homeward bound voyage, at the Isles of France and Bourbon, and at all or any other place or places what or wheresoever." There was also this clause: "And it shall be lawful for the said ship in this voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever, as well on this side as on the other side of the Cape of Good Hope." It was at first contended that the vessel might go to Bengal, and that the ship being there, the voyage might be abridged, and her further progress to China abandoned, on the ground that vessels insured might always return back from any point within the limits of the voyage contained in the policy. But, says the reporter, "Lord *Mansfield* having intimated a clear opinion that the general words were, by the expressions of 'in the outward, or homeward-bound voyage,' and 'in this voyage,' qualified and restrained so as to mean, 'all places whatsoever in the usual course of the voyage to and from the places mentioned in the policy,' this ground was immediately abandoned." See Coles *v.* Marine Ins. Co., 3 Wash. C. C. 159. In Winthrop *v.* Union Ins. Co., 2 Wash. C. C. 7, the insurance was on goods "at and from New York to the Cape of Good Hope, with liberty to proceed to and trade at the Isle of France, and any other port or ports in the Indian seas, and at and from these ports back to New York," with liberty to touch and trade as usual on the outward and homeward voyages. The vessel sailed from New York to the Cape of Good Hope, touched at the Isle of France, went thence to the island of Ceylon, thence to Madras, where part of the cargo was sold, and an order on Tranquebar taken in return, she then sailed to this port, purchased some goods, and then went to Batavia where the remainder of the outward

too, if a port be named, it is a deviation to enter another not named in the stead of that which is named, although the substituted port is no further off, and in no way increases the risk.[1] And if the vessel is unable to enter the port by reason of a municipal regulation, the liberty is construed so strictly that she cannot go to any other port.[2] So if permission is given to deviate on the occurrence of certain specific events, these precise events must take place to give that liberty.[3] And, a liberty to cruise six weeks, means only six successive weeks from the commencement of the cruise.[4]

It is sometimes intended by the parties, that the ship shall have two termini, the beginning and end of the voyage, but may make intermediate passages, backwards and forwards, between these termini. Perhaps the most usual way of meeting the exigencies of such a case as this, is by a policy on time, which permits the insured to go where he will. But it may be provided for by certain liberties, expressly given. For this purpose, liberty is sometimes given "to go backwards and forwards," or "to make any intermediate passages," or "to touch and return,"

cargo, and that purchased at Tranquebar, was sold, and the proceeds invested in a return cargo, with which the vessel sailed. Held no deviation. In Lambert *v.* Liddard, 5 Taunt. 480, the insurance was on a vessel at and from Pernambuco, or any other port or ports in the Brazils, to London. Not being able to obtain a cargo at Pernambuco, the captain sailed to St. Salvador, a port six hundred miles to the southward, and more distant from London than Pernambuco. This was held not to be a deviation.

[1] As the stopping at Morrison's Haven instead of Leith on a voyage from Carron to Hull with liberty to call at Leith. Eliot *v.* Wilson, 4 Brown, 470.

[2] Stevens *v.* Commercial Mut. Ins. Co., 6 Duer, 594. The insurance in this case was by a time policy, which contained this clause: "Warranted not to use ports and places in Texas, except Galveston, nor foreign ports and places in the Gulf of Mexico, nor places on or over Ocrocoke Bar." Permission was afterwards given to use the port of Laguna for one voyage. When the vessel arrived at Laguna, she was not permitted to enter under a regulation made prior to the permission, until she had entered at a neighboring port, Laguna not being a port of entry. The vessel went to Sisal for that purpose, and was there lost. Held that this was a deviation which discharged the underwriters.

[3] Duerhagen *v.* United States Ins. Co., 2 S. & R. 309. Goods were insured in this case from New York to Bremen. Liberty was given the captain on arriving on that coast to enter a Dutch port, if he could do so with safety. Hearing that he could proceed to Amsterdam, without being molested by the British, he attempted to enter that port and was captured by the French. This was considered a deviation.

[4] Syers *v.* Bridge, 2 Doug. 527.

or "to touch one or more times," or the like.[1] If, however, after performing these intermediate voyages, the vessel is to sail thence to a home port, she cannot after sailing for home put back, unless through an excusing necessity;[2] and "to such a

[1] In Thorndike *v.* Bordman, 4 Pick. 471, the insurance was on the vessel and cargo from Boston to any port or ports beyond the Cape of Good Hope, one or more times to the same port, for the purpose of selling the outward and procuring a return cargo, and at and from thence to a port of final discharge in Europe, or the United States, with liberty to stop at the usual places for refreshments, and to trade thereat. The master sailed for Cochin China, with directions to purchase a cargo of sugars, but as he had only gold coin on board, with which he could not trade, he sailed thence to Manilla, with the intention of there purchasing a cargo of sugars, or of exchanging the gold for silver, and returning to Cochin China. This latter intention was executed, and he proceeded to Saigon, a port to which an American vessel had never before been. Here he obtained part of his return cargo, and sailed for Batavia, where being unable to obtain any sugars, except at a great expense, he went to Samarang, an outport of the island of Java, but before sailing he was obliged, by a law of the island, in order to proceed to S., to discharge the sugar brought from Cochin China. At Samarang, the cargo was completed, and the vessel sailed for Holland and was lost. Held, that neither the returning from Manilla to Cochin China, nor the selling at Batavia of the sugars purchased in Cochin China, and going thence to Samarang and there taking in a full cargo was a deviation. See also Bize *v.* Fletcher, 1 Doug. 284. A very liberal construction was given to the policy in Hunter *v.* Leathley, 10 B. & C. 858. Goods were insured "at and from Singapore, Penang, Malacca, and Batavia, all or any, to the ship's port or ports of discharge in Great Britain, or to any port or ports in the United Netherlands, or to Altona or Hamburg, or all or any, with leave to touch, stay, and trade at all or any ports or places whatsoever and wheresoever in the East Indies, Persia, or elsewhere." Liberty was given to proceed to any ports and places whatsoever and wheresoever, in any direction and for any purpose necessary or otherwise, etc. The court held that the assured must have intended to have protected himself against loss at whatsoever places in the East the goods might be put on board. Part of a cargo of coffee was put on board at Batavia, with the intention of taking it to Antwerp, but there not being enough, the vessel went to Sourabaya, another port in the island of Java, and there loaded more coffee, with the intention of taking it to Antwerp, returned thence to Batavia, and thence sailed to Antwerp. Sourabaya is not in the direct course from Batavia, Singapore, Penang, or Malacca, to Europe, nor in the direct course of any one of those four places to any other of them. The underwriters were held liable. Affirmed. Leathly *v.* Hunter, 7 Bing. 517, 5 Moore & P. 457, 1 Cromp. & J. 423, *s. c.* at *Nisi Prius*, Lloyd & W. 244.

[2] Burns *v.* Holmwood, Q. B., 1856, 19 Law Reporter, 163. The policy was on goods on a voyage "at and from Liverpool to Cardiff, whilst there, and thence to all or any part or parts, place or places, islands and settlements on the west coast of America, in the Pacific, and seas adjacent, particularly Acapulco and Panama on the outward voyage, and the Chincha Islands, on the homeward, backward and forward, or forward and backward in any order or succession, during the vessel's stay, trading, discharging, and loading there, and thence back to a port or ports of discharge in the United Kingdom." The vessel arrived at Callao and sailed thence for the Chincha Islands, and took a full cargo of guano, with which she returned to Callao, at which

port and a market" covers the vessel while on her way from that port to any other port in search of a market, to which it is usual to go for that purpose, under such a clause, or which is actually within what must be deemed a reasonable distance.[1]

The question of the order in which ports should be visited is presented, either when many ports are named, or when there is liberty to touch or trade at ports between certain termini, or

place vessels from the Chincha Islands clear, and sailed on her homeward voyage. After being at sea a day or two, the vessel sprung a leak, and was compelled to return to Callao. It was necessary to unload the cargo, which was sold for less than it cost to take it out of the vessel. After the vessel was repaired, she returned to the Chincha Islands, took in another cargo and sailed for home, and was lost on the way. Held a deviation, because the vessel had once begun her homeward voyage. But it is sometimes difficult to determine when the outward voyage terminates. In Ashley *v.* Pratt, 16 M. & W. 471, a ship was insured "at and from Liverpool to ports and places in China and Manilla, all or any, during the ship's stay there for any purposes, and from *thence* to her port or ports of calling and discharge in the United Kingdom." The vessel went to Tongkoo in China, discharged part of her cargo there, sailed thence to Manilla, and there discharged most of the remaining cargo. Freights being low at Manilla, a cargo of opium was taken on board for Tongkoo, with the intention of there seeking a freight back to the United Kingdom. On the voyage to Tongkoo the vessel was lost. It was contended that the voyage back from Manilla to Tongkoo was a deviation, but the court held that *from thence* meant not from Manilla only, but from any place in China or Manilla. This case was affirmed on appeal. Pratt *v.* Ashley, 1 Exch. 257.

In Coffin *v.* Newburyport Mar. Ins. Co., 9 Mass. 436, a ship and cargo were insured from Newburyport to one or more ports beyond the Cape of Good Hope, one or more times, at and from them, or either of them, to her port of discharge in the United States, with liberty to touch and trade, at any ports and places on the outward or homeward voyages. The vessel arrived at the Cape of Good Hope, and sailed thence for the Isle of France. It was held that an intermediate voyage from the Isle of France to the Cape of Good Hope, and back to the Isle of France, would not be protected by the policy.

[1] Thus, where a vessel was insured "at and from Boston to St. Thomas, and a market in the West Indies, and at and from thence to a port of discharge in the United States," it was held, that if there was no market at St. Thomas the master might go from thence to any port in the West Indies for a market, and after leaving that port might return, if such return were with the honest intent of finding a market, and might visit the islands in any order. Deblois *v.* Ocean Ins. Co., 16 Pick. 303. See also, Maxwell *v.* Robinson, 1 Johns. 333, where, however, the court said they did not mean to say that the same construction was to be given to a policy in any other trade than that to the West Indies.

In Smith *v.* Bates, cited 2 Johns. Cas. 299, the court said, that on a policy to a market in the West Indies, the vessel might go from market to market until the whole cargo was disposed of. And in Gaither *v.* Myrick, 9 Md. 118, it was held that the description "to Valparaiso and a market," would authorize the ship to visit ports other than that named.

embraced within a certain country, district, or coast. Under such a liberty all need not be visited. The insured is never bound to exercise a mere liberty, and the mere omission to do so, is never a deviation.[1] It must be noticed, however, that although the voyage may thus be shortened by the omission of a *terminus ad quem*, it must not be by the omission of the *terminus a quo*, as by commencing the voyage at a point in the route at which the vessel had only liberty to stop.[2]

[1] In Marsden *v.* Reid, 3 East, 572, goods were insured "at and from Liverpool to Palermo, Messina, Naples, and Leghorn, provided the French should not be at Leghorn." Intelligence having been received that the French were in possession of Leghorn, the vessel took goods and cleared for Naples only, and was captured before arriving at the dividing point. It was held that the vessel had a right to go to Naples alone, and that the underwriters were liable. So, where insurance was effected on goods from Boston to Terceira and back to a port of discharge in the United States, a quarter per cent. to be added for every other port used in the Western Islands besides Terceira, and the vessel went immediately to Graciosa, one of the Western Islands, it was held not to be a deviation. Hale *v.* Mercantile Mar. Ins. Co., 6 Pick. 172. The rule has been laid down the same way in New York. Kane *v.* Columbian Ins. Co., 2 Johns. 264. The voyage in this case was from New York to Antigua, and at and from thence to Curaçoa. It was held that the vessel might go to Curaçoa, without going to Antigua, although she sailed on a voyage to the latter named port, and the intention to go to Curaçoa was formed while in a port of distress. So, in South Carolina, Cross *v.* Shutliffe, 2 Bay, 220, where the vessel was insured on a voyage from Charleston to Cape de Verd Islands, and from thence to the coast of Africa, it was held that the vessel might go directly to Africa, the evident intention of the parties being that the vessel should have liberty to stop at the Cape de Verd Islands, which liberty the master was not bound to exercise. And where a vessel was insured from St. Johns to Kingston, and a market in Jamaica, with orders to proceed to Jamaica, and when off the east end of that island, to proceed to Port Maria, if in season to fulfil a contract for the delivery of goods at that place, but otherwise to proceed to Kingston, and then go to Port Maria, it was held that the vessel might go directly to Port Maria, although these orders were not communicated to the underwriters. Houston *v.* New England Ins. Co., 5 Pick. 89. But in Marine Ins. Co. *v.* Stras, 1 Munf. 408, where insurance was made, "at and from Norfolk to Curaçoa, with liberty of going to any other island in the West Indies, or any other port on the Spanish Main, and at and from thence back to Richmond," it was held that the vessel was bound to proceed to Curaçoa first, and could not stop at St. Thomas and sail from thence home.

[2] As where a ship and freight were insured "at and from Calcutta, with liberty to touch at Madras, for trade, and to take in a part of her cargo," beginning the said adventure "at and from Calcutta, and to endure until her arrival at New York," it was held that a voyage from Madras to New York, the vessel not having been at all at Calcutta, was not covered by the policy. Murray *v.* Columbian Ins. Co., 4 Johns. 443. In Maryland Ins. Co. *v.* Bossiere, 9 Gill & J. 121, insurance was effected on the return cargo of a vessel, at and from St. Andreas to Baltimore, with the liberty of two

If any or all of these ports are visited, they must be visited in their proper order. What this order is, it may not always be easy to determine by rules of law. We should say, however, first, that if the ports be named in the policy, they must be visited in the order in which they are named,[1] unless the policy itself, the order of the enumeration, the character of the voyage, or other similar circumstances, show that this order was accidental, and not intended to prescribe the course of the voyage. Secondly, if the ports are not enumerated, or are mentioned in an order not intended to direct the course of the voyage, the ports entered must be visited in their geographical order.[2] This generally means, but does not always or necessarily mean, the order in which they would stand on a map; but it may differ from this, for what is intended is, that order which is most consonant with, or conducive to the progress of the ship to its ultimate destination.[3] This last, is the rule which in fact, enters into all the others. Thus, whether an island is to be included in a designation in the policy, is to be determined, not by the geography, but by commercial usage.[4] And, generally, whatever be the words used, or however wide the liberty given, if there be a definite ultimate destination, this liberty must be construed and exercised in such a way as shall be, on the whole, reconcilable with the proper progress of the vessel towards that destination.[5]

other ports on the Spanish Main, and at and from any of them to Baltimore. In the order for insurance, mention was made that the vessel was reported as having sailed from San Blas for St. Andreas. The vessel had sailed from St. Andreas for Cordea and San Blas, and was proceeding from the latter place to St. Andreas, when she was lost. The court held that the risk had not commenced.

[1] Thus, in Beatson *v.* Haworth, 6 T. R. 531, the policy was on the ship, "at and from Fisherrow to Gothenburgh, and back to Leith and Cockenzie." On the homeward voyage, the ship put into Cockenzie before going to Leith. The latter port was further from Gothenburgh than Cockenzie, but it was held to be a deviation to put into Cockenzie first.

[2] See Clason *v.* Simmonds, cited 6 T. R. 533.

[3] See Gairdner *v.* Senhouse, 3 Taunt. 16.

[4] Robertson *v.* Clarke, 1 Bing. 445, 8 Moore, 622; Robertson *v.* Money, Ryan & M. 75.

[5] A very liberal construction was put upon the policy in Bragg *v.* Anderson, 4 Taunt. 229. The insurance was "at and from Martinique, and *all* or any of the West India islands to London, the ship to have liberty to proceed, sail to, and to touch and stay at any ports or places whatsoever." The ship sailed from Martinique to St. Domingo,

If such ultimate destination is not designated, then it seems that any permitted port may be visited in any order, for the purpose of obtaining instructions or orders which shall determine the final destination of the ship.[1] In a late case, the voyage was from New York to Gibraltar, and at and from thence to Tarragona, with liberty of using one other port between Tarragona and Gibraltar, and at and thence to New York. By a subsequent indorsement, permission was given to stop at one other port between Tarragona and Gibraltar. The court held, that this latter clause gave the right to stop at one other port between the places mentioned, on the homeward voyage.[2]

which was much out of her direct course to London, took in her cargo at St. Domingo, and sailed thence for London. Sir James *Mansfield*, C. J., held this not to be a deviation.

[1] Mellish *v.* Andrews, 16 East, 312, 2 M. & S. 27; s. c. Andrews *v.* Mellish, 5 Taunt. 496. The policy in this case, was from London to the ship's port or ports in the Baltic. It was held, that before the port of discharge was selected, the vessel was not confined to take the ports in a successive order, but might return to a port she had quitted for orders as to her port of discharge, and it was said, that after the port of discharge is selected, the ship must proceed direct, touching at ports only in a successive order. In Armet *v.* Innes, 4 J. B. Moore, 150, the policy was "at and from London to New South Wales, and from thence to the ship's loading port or ports in the East Indies and elsewhere, forwards and backwards, and backwards and forwards, as well on the other side, as at and on this side the Cape of Good Hope, in ports and at sea, at all times and in all places, on all services until her safe arrival at her port of discharge in Great Britain." It was also provided, that "it should be lawful for the vessel in the voyage insured, to proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever and for any purpose whatsoever." The vessel went with convicts from London to New South Wales, thence in ballast to Batavia, where she took on board a quantity of iron in bars, which she discharged at Sourabaya and was there loaded with a full cargo of rice, with which she sailed for the Mauritius, where part was unloaded, and the vessel being injured, was broken up. Held to be no deviation, partly on the ground of the existence of a usage for vessels in voyages of that description to trade. See also, Ashley *v.* Pratt, 16 M. & W. 471, 1 Exch. 257.

[2] Perkins *v.* Augusta Ins. and Banking Co., Sup. Jud. Ct. Mass., Nov. T. 1855.

SECTION V.

THAT A DEVIATION MUST BE VOLUNTARY.

Deviation applies only to a voluntary act. The very definition shows that any change which can be justified, or shown to proceed from a just cause, is not a deviation. And, of course, no act done under compulsion, can be regarded as a deviation.[1] The change of risk, to operate as a "deviation," must be not only voluntary, but unnecessary; or rather, if it be necessary, it must be considered as compelled, rather than as voluntary. If, therefore, it be necessary to go out of the course for repairs, to obtain provisions, or for any such sufficient cause, it is no deviation;[2]

[1] Winthrop *v.* Union Ins. Co., 2 Wash. C. C. 7. In this case, the vessel was put in the hands of the American consul at the Isle of France, on account of the death of her officers. The underwriters were held liable for acts done by the consul, which, had they been done by the owners or their agents, would have discharged them. So, where a vessel was carried out of her course and detained about six weeks by a cruiser, it was held to be no deviation. Scott *v.* Thompson, 4 B. & P. 181. In Phelps *v.* Auldjo, 2 Camp. 350, it was held that, where the master of a merchant vessel was ordered by a man-of-war, to go out to sea to examine a strange sail, and the master did so without remonstrance, this was a deviation, it not being proved that the master acted under any duress or compulsion. Lord *Ellenborough*, C. J., said it would have been otherwise, "If a degree of force was exercised towards him, which either physically he could not resist, or morally, as a good subject, he ought not to have resisted."

[2] In Pouverin *v.* La. State M. & F. Ins. Co., 4 Rob. La. 234, it was held, that a vessel insured from New Orleans to Vera Cruz, might, on her way through Lake Borgne, touch at the Bay of St. Louis for a pilot to conduct her through Pass Christian.

When a vessel is damaged by a peril of the sea, she may go out of her course to refit. Motteux *v.* London Ass. Co., 1 Atk. 545; Gilbert *v.* Readshaw, Marsh. Ins. 208, nom. Guibert *v.* Readshaw, Park, Ins. 402; Coffin *v.* Newburyport Mar. Ins. Co., 9 Mass. 436, 447; Coles *v.* Marine Ins. Co., 3 Wash. C. C. 159; Akin *v.* Miss. M. & F. Ins. Co., 16 Mart. La. 661; Hall *v.* Franklin Ins. Co., 9 Pick. 466; Turner *v.* Protection Ins. Co., 25 Maine, 515. And if, after the risk has commenced, the vessel becomes so short of hands that the voyage cannot safely be performed, a deviation to obtain a crew is justifiable. Cruder *v.* Philadelphia Ins. Co., 2 Wash. C. C. 262. In this case, the vessel was at a port when the loss took place, but as no crew could be obtained there, a voyage to another port was held justifiable. See Cruder *v.* Penn. Ins. Co., 2 Wash. C. C. 339. So, where the loss took place at sea. Winthrop *v.* Union Ins. Co., 2 Wash. C. C. 7.

Where a vessel is driven out of her course by stress of weather, of course, this is no

but it becomes a deviation, if carried beyond the necessity. Thus, if a master meets with an accident, or finds his ship for any cause in need of repair and refitting, it is his duty, supposing the need to be of sufficient magnitude, to go to the nearest and most accessible port in which he can obtain all that he wants. And, if on reaching that port, or by information received on the way thither, he learns that he cannot get the necessary repairs or supplies there, he may go to another port, and then, under the same condition, to another, until his ship be repaired and refitted, and it will be no deviation, — *provided*, that he use all proper means and diligence to lose as little time in this way, and depart as little from the voyage intended, as may be consistent with the effectual repair or supply which he needs.[1] For, whatever be the necessity, unnecessary delay or waste of time or wandering under that necessity, will be a deviation.[2] But if a

deviation. Campbell *v.* Williamson, 2 Bay, 237; Miller *v.* Russell, 1 Bay, 309. But after the storm has subsided, or the necessity which compelled the deviation, ceased to exist, the vessel should pursue the direct course for the port of destination. Harrington *v.* Halkead, Park, Ins. 403; Lavabre *v.* Wilson, 1 Doug. 284. See Neilson *v.* Col. Ins. Co., 3 Caines, 108, 1 Johns. 301. And in Delaney *v.* Stoddart, 1 T. R. 22, it was held, that where a vessel in her loading port was driven out into another port by a storm, she might continue her voyage from there, without going back to the port from which she was driven.

If a vessel cannot enter her port of destination, on account of the lowness of the water, or remain off the port for fear of shipwreck, she may go to another port. Byrne *v.* La. State Ins. Co., 19 Mart. La. 126. In Stocker *v.* Harris, 3 Mass. 409, a vessel insured "under whatever papers she might sail," went out of her course to obtain papers. Held, that this was not such a necessity as would justify a deviation.

In Wiggin *v.* Amory, 13 Mass. 118, the vessel was loaded at Bayonne, and in attempting to go out of the harbor struck on a bar, and was obliged to put back for repair. "It was found necessary or most for the interest of all concerned, to send part of the cargo round to Passage to be there reladen." After the repairs were finished the vessel went to Passage, took in her cargo and proceeded on her homeward voyage. Held, not to be a deviation.

The master is not obliged before deviating, to sacrifice a deck load, unless perhaps the whole trouble is caused by his being overloaded. American Ins. Co. *v.* Francia, 9 Barr, 390.

[1] Hall *v.* Franklin Ins. Co., 9 Pick. 466, 483; Motteux *v.* London Ass. Co., 1 Atk. 545.

[2] Turner *v.* Protection Ins. Co., 25 Maine, 515. The vessel, in this case, was insured on a voyage from Havana to St. Petersburg. Soon after leaving port, the vessel met with a disaster, and the master was compelled to seek a port for repair. He altered his course for Boston, which was not the nearest port, and when within fourteen miles of Cape Cod, the weather being thick and hazy, he ran into Portland. The court said: "To

vessel is driven by a strict necessity into a port, which it would have been a deviation to enter without such necessity, this is not made a deviation by proof that the master, before the necessity and without reference to it, intended to enter that port, provided the necessity occurred before he took any steps to carry that intention into effect.[1]

So too it is, if not a necessity, or a compulsion, yet a justifying cause for a change of risk, that it was undergone for the purpose of avoiding a peril.[2] Thus, if a ship, to avoid seizure in port, goes to sea before she is properly loaded, and is thereby obliged to put into a port out of the course of her voyage, the insurers are still liable.[3] So, if the port of destination is obstructed by ice, the vessel may put into a neighboring port.[4]

Similar and analogous questions occur in this case, as before. Was the peril so escaped, of sufficient reality and magnitude to justify the departure from the usual course, and was the departure no greater in extent, either of space or time, than was reasonably necessary to make this escape effectual.[5] Nor, does it seem to

determine what port to seek for repair, the master should consider the extent of the danger, its position, as near to, or more distant from the course of the voyage, and the facility and speed with which the necessary machinery, materials, and labor, can be procured and applied to the vessel's use. The master, in most cases, must be the principal judge of the degree of peril to which his vessel is exposed, and of her ability to proceed with safety to a nearer or to a more distant port, and of the facilities for repairing her at different ports. If he is competent and faithful, his decision respecting these matters, made in good faith, should be satisfactory to all interested, although he should err in judgment." It was accordingly held, that the master had not acted improperly in selecting Boston as the port of repair, and that, on arriving off that port, he exercised a wise discretion in going to Portland.

[1] Kingston *v.* Phelps, cited 7 T. R. 165; Hobart *v.* Norton, 8 Pick. 159.

[2] As capture. Driscoll *v.* Bovil, 1 B. & P. 313; Whitney *v.* Haven, 13 Mass. 172; Reade *v.* Comm. Ins. Co., 3 Johns. 352; Post *v.* Phœnix Ins. Co., 10 Johns. 79; Goyon *v.* Pleasants, 3 Wash. C. C. 241; Lee *v.* Gray, 7 Mass. 349, 352. In Governeur *v.* United Ins. Co., 1 Caines, 592, the captain of a Danish vessel, fearing capture by the British, put his vessel under the protection of an American ship of war, the captain of which sent the vessel home as a prize, and it being captured on the way, the underwriters were held liable.

[3] O'Reilly *v.* Gonne, 4 Camp. 249.

[4] Graham *v.* Comm. Ins. Co., 11 Johns. 352.

[5] In Oliver *v.* Maryland Ins. Co., 7 Cranch, 487, *Marshall*, C. J., states the law as follows: "No doubt is entertained, that the danger of capture from the Algerines, if proved to be real and immediate, would justify the continuance in port. And the

be material, that the peril which the ship thus endeavors to escape, should be one that is insured against. This may not be certainly the law, but assuredly a change of risk would be no deviation, when it was made to avoid a peril, which, although not insured against, would naturally affect, if it were encountered, other risks that were insured against. And most real and substantial risks are so far connected, that those insured against can seldom be wholly independent of, or unaffected by others against which insurance is made.[1]

apprehension of such danger, if founded on reasonable evidence, would produce a like effect. But in each case, the danger must not be a mere general danger, indefinite in its application and locality. If it were so, in time of war, any delay, however long, in a port would become excusable, for there would always be danger of capture from the enemy's cruisers. Nor is it sufficient that the danger should be extraordinary, for then any considerable increase of the general risk would authorize a similar delay. The danger, therefore, must be obvious and immediate in reference to the situation of the ship at the particular time. It must be such as is then directly applied to the interruption of the voyage, and imminent; not such as is merely distant, contingent, and indefinite." See also, Riggin *v.* Patapsco Ins. Co., 7 Harris & J. 279, where it was held, that a deviation to avoid a capture which would not be justified by the law of nations, was not justifiable, the captain having no valid reason to suppose that the force in possession of the place which he avoided, would violate the rights of a neutral. In Murden *v.* South Carolina Ins. Co., 3 Const. R. 200, the terminus *ad quem* was changed on the ground that the vessel was importing slaves, and that this was prohibited by an act of Congress, and also, on the ground that the master apprehended that war had broken out. The latter was considered a groundless pretext, and it was held, that as both parties knew of the act of Congress, it furnished no excuse for the deviation. In Riggin *v.* Patapsco Ins. Co., *supra*, it was held, that though a vessel may deviate to obtain information in regard to her port of destination being in possession of the enemy, yet, if there is a port in the direct line of the voyage, she cannot go to one out of the course.

[1] In O'Reilly *v.* Royal Exch. Ass. Co., 4 Camp. 246, the goods were warranted free of capture and seizure in port. To avoid seizure, the vessel left port in an unseaworthy condition, and was obliged to put into another port, out of the course of the voyage. Held, that the underwriters were not liable, on the express ground that the deviation was to avoid a peril not insured against. Breed *v.* Eaton, 10 Mass. 21, seems to be to the same effect. Goods were insured on a voyage from Liverpool to Savannah. On arriving off Savannah, the master learned that the non-importation act was in force, and that under it, his goods were liable to seizure and confiscation. To avoid this, and for no other reason, the master deviated. The case is briefly reported. The defence was twofold, that the underwriters were not liable for a deviation to avoid a peril not insured against, and that no insurance against the laws of their own country could bind the insurers. The reporter then adds, "And the court being of this opinion, the plaintiffs were nonsuit." It does not then appear directly, from this statement, on which ground the opinion of the court proceeded. But, as the case was argued on an agreed statement of facts, part of which was, that the plaintiff should become non-

If a ship is warranted to depart with convoy, it is no deviation if she sail to the port of rendezvous for convoy.[1] And the law permits her to do this, if she is not warranted to sail with convoy.[2] So, too, a deviation on the voyage,[3] or a delay in port,[4] for the purpose of joining convoy, is justifiable, if reasonably necessary for that purpose. But it seems that if only liberty to join convoy be given, the insured is not bound to join convoy, but may waive his right.[5]

It is quite certain that a delay or a departure from the course to save life on board another vessel, or even to give assistance to those in distress, is not a deviation. Always provided, however, that the change of course, or the delay, was no greater and no longer continued than the cause for it actually required.[6]

suit, if the court should be of opinion that the deviation discharged the underwriters, we may infer the case was decided on this ground, more especially, as it is not very apparent how the question as to the legality of the insurance could arise. But, however this may be, the weight of authority seems to be in favor of the view, that a departure from the course to avoid a peril, although that peril is not insured against, is no deviation. This must not be confounded with the question before discussed, of an abandonment of the voyage on account of a peril. In Robinson *v.* Marine Ins. Co., 2 Johns. 89, the vessel was insured against sea risks only, and a deviation to avoid capture, was held to be justifiable. This case was decided principally on the authority of Scott *v.* Thompson, 4 B. & P. 181, where it was held, that if a ship is insured against sea risk and fire only, and is carried out of its course by a peril not insured against, the underwriters are liable for a loss by one of the perils insured against. To the same point is Green *v.* Elmslie, Peake, N. P. 212. Mr. Arnould, 1 Ins. 406, distinguishes between a vessel being compelled to deviate, by a peril not insured against, and a deviation to avoid a peril of this description, holding the insurers not liable in the latter case. This distinction is repudiated by Mr. Phillips, 1 Ins. § 1023, all the authorities, however, which he cites to this point do not support his opinion. In Riggin *v.* Patapsco Ins. Co., 7 Harris & J. 279, a strong opinion was expressed in favor of holding the underwriters liable in case of a deviation to avoid a peril not insured against, but the point was not decided.

[1] See cases ante, p. 123, n. 3.

[2] Bond *v.* Nutt, 2 Cowp. 601.

[3] Enderby *v.* Fletcher, Park, Ins. 410; D'Aguilar *v.* Tobin, Holt, N. P. 185, 2 Marsh. 265; Patrick *v.* Ludlow, 3 Johns. Cas. 10.

[4] Snowden *v.* Phœnix Ins. Co., 3 Binn. 457.

[5] Heselton *v.* Allnutt, 1 M. & S. 46.

[6] There can be no doubt at the present day, but that a deviation to save life on board another vessel is justifiable. In the case of The Schooner Boston, 1 Sumner, 328, Mr. Justice *Story* said: "The stopping for this purpose could not, in my judgment, be deemed by any tribunal in Christendom a deviation from the voyage, so as to discharge any insurance, or to render the master criminally or civilly liable for any subsequent disasters to his vessel occasioned thereby." See also, Bond *v.* Brig Cora, 2 Wash. C. C. 80; Lawrence *v.* Sydebotham, 6 East, 45; The Ship Henry Ewbank,

Whether it is a sufficient excuse or necessity for a deviation, that it was intended to save life on board the vessel insured, may not be so certain. We should say, generally, it is a sufficient necessity. But if the necessity arose from not having sufficient means of cure on board, and they were such as the vessel should carry, then it would be a deviation and would discharge the underwriters.[1] But it seems to be held that a delay or a depart-

1 Sumner, 400; Settle *v.* St. Louis Perpet. M., F. & L. Ins. Co., 7 Mo. 379; Walsh *v.* Homer, 10 Mo. 6.

[1] The question as to the right of master to deviate, in order to save life on board his own vessel, is not without its difficulty. There can be no doubt that if so many of the crew become disabled by sickness, that the vessel cannot be navigated in safety to her destined port, a deviation to obtain a crew is justifiable. So, too, if the provisions give out through no fault of those on board the vessel, there being no question as to the vessel's sea-worthiness in this respect, when she left port, the underwriters are liable for a loss notwithstanding a deviation. But if a person rightfully on board be taken sick, and for the sole purpose of saving his or her life, the master puts into port, the question is one of some difficulty, whether the underwriters are not thereby discharged. In Perkins *v.* Augusta Ins. & Banking Co., Sup. Jud. Ct., Mass., Nov. T. 1855, the wife of the captain was on board in a pregnant condition. To obtain medical assistance and advice, the captain deviated from his course and put into Gibraltar. The court decided that a deviation to save life on board was justifiable, provided it was necessary. *Merrick*, J., said: "To make the excuse valid and effectual, it must, without doubt, be shown that there was a real necessity for the departure of the vessel from its proper course. The exigency which demands relief must be equal in importance to the intervention which is required in its behalf. Whether it exists and what it is must always be a question of fact. To determine this rightly, all the circumstances of infirmity and suffering and of relief afforded on the one hand, must be considered in connection with the increased length of the voyage, the prolonged time required to accomplish it, and the additional risk incurred on the other." It was then stated that if these conflicted it became the duty of the master to deviate. The case was sent back to the jury to determine whether "the brig was taken into the port of Gibraltar, solely for the purpose of affording succor to the distressed upon a fit and proper occasion."

The same question arose in the early case of Woolf *v.* Claggett, 3 Esp. 257. A deviation was attempted to be justified on the ground that "the captain was taken ill with a severe fit of the gravel: That the mate, having pricked his finger by accident, his hand and arm swelled to such a degree, as to render him incapable of doing his duty; and that they put into Plymouth for the purpose of procuring medical assistance." Lord *Eldon* held, that it was incumbent on the plaintiff to show that he had provided against accidents of this nature, by every proper precaution, as to medicines and necessaries for the voyage, as much as he was bound with respect to the tightness of the ship. That the plaintiff should show that the surgeon on board the vessel was provided with such medicines and instruments as would probably become necessary in the course of the voyage, arising from the common casualties of mankind. In this case, the ship's surgeon was unprovided with a syringe, which was considered to be an instrument very necessary for the gravel, and Lord *Eldon* was of the opinion,

ure for the purpose of saving property is, under all circumstances, a deviation;[1] perhaps for the reason that if the property be saved, the salvors may claim out of it a recompense by way of salvage, and in decreeing salvage an admiralty court may, and in practice always does, allow for the loss of insurance. A delay for the purpose of towing a vessel is certainly a deviation.[2]

If an entirely new voyage is undertaken, the old one being wholly abandoned, this is of course a deviation, and the widest deviation; although it is not often the case, that such undertaking of a new voyage could be so far justified by necessity, or by any circumstances, as would prevent it from being a deviation, and still hold the insurers.[3]

upon the whole evidence, that the plaintiff had failed to make out a case of necessity. So in Kettell *v.* Wiggin, 13 Mass. 68, where a vessel, insured from Gibraltar to the United States, with liberty to proceed to the Cape de Verd islands for salt, on arrival at the Isle of May, finding that there was a scarcity of provisions and water there, made an intermediate voyage to procure them, it was held to be a deviation. This was decided on the ground that the vessel should have been sufficiently provided at Gibraltar to have enabled her to stay and load at the Isle of May without depending on procuring provisions there. See Thomas *v.* Royal Exch. Ass. Co., 1 Price, 195.

[1] Bond *v.* Brig Cora, 2 Wash. C. C. 80; Mason *v.* Ship Blaireau, 2 Cranch, 240; Warder *v.* Goods, etc., 1 Pet. Adm. 31.

[2] Hermann *v.* Western M. & F. Ins. Co., 13 La. 516; Natchez Ins. Co. *v.* Stanton, 2 Smedes & M. 340.

[3] In Winter *v.* Delaware Mut. Ins. Co., 30 Penn. State, 334, insurance was effected on a vessel and cargo from Baltimore to Portland in Oregon. The vessel put into Rio Janeiro in distress, and the only way in which she could be repaired was by funds raised on a bottomry bond payable in San Francisco. The ship sailed for this port, but was again obliged to put back to Rio Janeiro, where she was condemned and sold together with the cargo. It was contended that the deviation by sailing on the voyage to San Francisco discharged the underwriters. The court, per *Lowrie*, C. J., said: "It was certainly the duty of the master, under the circumstances, to provide for the transportation of the merchandise to its destination by the best means in his power, and so carried, it would still be under the protection of the insurance. If he could not send it by the direct route, he would be justified in sending it by another; or in taking it by another in his own vessel, if he could not get it repaired so as to go directly. So far then as relates to the merchandise, the accident, and the necessary terms of repairing it, justified the change of route by San Francisco." See post, p. 309, n. 3.

SECTION VI.

OF INTENDED DEVIATION.

If before the policy attaches, the insured, acting in good faith and for sufficient reason, wholly abandons his intended voyage, and substitutes another, the insurers never assume, in fact, any risk, because no risk under their policy ever exists. They therefore, in commercial phrase, do not earn the premium, and it may be reclaimed by the insured.[1] And if an entirely different voyage be intended, for any reason, the policy upon the voyage insured never attaches, although the ship is at the proper port, and sails from it at the proper time; for she never sails on that voyage. It is sometimes a little difficult to reconcile the cases which come under this rule, with those to which another rule is applicable, namely, that which declares that no intended change shall amount to a deviation, until the insured has at least begun to carry it into effect; for a mere intention is not an act; and an intention to deviate is not carried into effect, although something is done to forward it, unless that something is an actual change of risk. Thus, if a vessel not insured as a letter of marque, takes out letters and arms herself, it has been held, by some authorities, that this act does not discharge the insurers;[2] nor if she

[1] See ante, ch. 5, sect. 2, p. 185.

[2] In Denison *v.* Modigliani, 5 T. R. 580, the ship and cargo were insured from Liverpool to Oporto. After the policy was taken out, the insured asked permission to take guns on board, and to have a letter of marque. The latter was refused, but it was nevertheless taken out. The ship was taken without having used the letter in any way. The underwriters were discharged on the ground that the captain had "a strong temptation to deviate," and that this was "an essential alteration of circumstances from the condition of the vessel at the time of the insurance." It is to be observed, however, that permission to take the letter of marque was asked and refused, which was strong evidence of the intention of the parties. And this is evidently considered as the ground on which the case was decided, in Moss *v.* Byrom, 6 T. R. 379, by Lord *Kenyon*, C. J., who gave the opinion of the court in Denison *v.* Modigliani. In Moss *v.* Byrom, the letter of marque was taken with the view of inducing the seamen to ship, but as it did not have the necessary certificate, it was invalid, and the question presented in the case of Denison *v.* Modigliani, was not decided. There are some dicta in England on this subject, which clearly show that the mere taking a

defends herself; but it certainly becomes a deviation as soon as she chases, or even lays to, for the purpose of making a prize.[1]

letter of marque would not avoid the policy. Thus in Raine *v.* Bell, 9 East, 195, 201, *Lawrence*, J., said: "If an intention to deviate, not carried into effect, will not avoid a policy, still less can a temptation to deviate. If the doing of a thing do not alter the risk of the underwriter, and be not expressly prohibited to be done, I cannot say that it vitiates the policy as upon the breach of an implied condition." And Lord *Ellenborough*, C. J., in Jarratt *v.* Ward, 1 Camp. 263, 266, said: "I believe the general opinion now is, that a mere irritation of this sort shall not operate as a deviation."

In this country the authorities are in accordance with the view that the mere taking a letter of marque does not discharge the underwriters. Wiggin *v.* Amory, 13 Mass. 118, 14 Mass. 1, 10; Wiggin *v.* Boardman, 14 Mass. 12; Haven *v.* Holland, 2 Mason, 230.

[1] One of the earliest cases on this subject is Cock *v.* Townson, Park, Ins. 396, where a vessel bound from Cork to Jamaica, cruised during the night in hopes of meeting with a prize. This was held to be a deviation. In Jolley *v.* Walker, Park, Ins. 396, "the ship was warranted to proceed on that voyage with sixty men, and equipped with twenty-two guns, eighteen and six pound shot, and sheathed with copper." The ship sailed with letters of marque, and was directed not to cruise, but to chase, take, and make prize of an enemy's ship, if one should be met in the direct course of the voyage. The question arose whether if an enemy's vessel was pursued and lost sight of, the chase could be kept. Lord *Mansfield*, C. J., left it upon the evidence to the jury, who found for the plaintiffs. In Parr *v.* Anderson, 6 East, 202, 2 Smith, 316, a vessel, insured "with or without letters of marque," saw a sail to leeward, altered her course a quarter of a point, and pursued the vessel about fifteen minutes, and then continued her voyage. At the first trial before the jury, Lord *Ellenborough* was of the opinion, "that the mere liberty to carry a letter of marque, would not justify such a deviation; nor give the assured a liberty of engrafting on a commercial adventure, an adventure for hostile capture." His lordship then added: "But if it were for the purpose of defence which might happen in various ways, as by making a show of confidence in the face of an enemy with a view to deter them from an attack; or if that could not be accomplished, with a view to obtain some advantage in the conflict, or the like," the verdict should be for the plaintiff. The jury having found a verdict for the defendant, a rule *nisi* was obtained, and the case argued before the King's Bench, and sent back to a jury to ascertain the usage of trade if any in similar cases. The case of Jolley *v.* Walker, was distinguished on the ground that it contained no liberty to take letters of marque, and that the warranty in regard to the number of men and guns, showed that the intention was to use the vessel as a private ship of war. Of the further progress of the case of Parr *v.* Anderson, we have only a brief note by Mr. *Park*, as follows: "This case came on to be tried again before Lord *Ellenborough*, and a special jury. From my memory of what passed, having been one of the counsel in it, aided by a note which I have seen, his lordship was strongly of opinion on the evidence, that this vessel had cruized, which of course, if the jury so thought, would put an end to the question. The jury found for the defendant; and I have no doubt upon that ground, from the evidence of the plaintiff's own witnesses." Park, Ins. 398. But this seems to confine the use to which a letter of marque may be put, within rather narrow limits. In Hooe *v.* Mason, 1 Wash. Va. 207, it was held that a merchant vessel with a letter of marque, was not obliged to act merely on the defensive, but might attack and chase an

If the owner of a vessel, insured at Boston on a voyage from Boston to New Orleans, changes his mind after the insurance is

enemy in sight, but could not cruise out of her course to look for prizes. And Mr. Justice *Jackson*, in Wiggin *v.* Amory, 13 Mass. 118, 127, said: "The only material difference between a privateer and a ship sailing under a letter of marque, is the use to be made of their commissions. The one intends to cruise in search of prizes, and the other intends to attack and take only what may fall in her way."

In Wiggin *v.* Amory, 13 Mass. 118, it was held that the capture of a vessel, although the vessel did not go off of her course, but merely delayed for a few hours, was a deviation, the underwriters not knowing that a letter of marque was taken. In Wiggin *v.* Boardman, 14 Mass. 12, the facts were the same, except that the jury found that the defendant knew before he subscribed the policy that the ship was armed and equipped, and commissioned as a letter of marque. The court said: "The knowledge that a vessel is armed, and has a commission, does not necessarily carry with it an assent that the vessel shall do any thing, which may cause a delay of her voyage, or that her commission shall be used, except for defence. It may be that she is armed only for the purpose of defence, and that her commission is to be used only to justify the attack of such vessels as may come in her way; and possibly the capture of such vessels, if that can be done without delaying the voyage." The underwriters were therefore held not to be liable.

In Haven *v.* Holland, 2 Mason, 230, which was an action on a policy of insurance upon merchandise on board the same vessel, the Volant, *Story*, J., instructed the jury that if, when the Volant wore round to attack the other vessel, "it was for the purpose of self-defence, to intimidate the enemy, and to repel a meditated attack, before the Volant should herself be disabled," the act was not a deviation, but otherwise, if it was done without any view to self-defence, and for the mere purpose of making a prize. He also ruled that if the capture was made in self-defence, the master had a right to take possession of the prize, and man it, if he could do so without injuriously weakening his own crew. In regard to what would be an act of self-defence, the learned judge said: "If a vessel, supposed to be an enemy's cruiser, be in sight, and apparently intend an attack upon a merchant vessel, the master of the latter is bound to exercise his best skill and judgment as to the time and mode of his defence, and if he act honestly and fairly, he will be justified, whatever may be the event. He is not bound to endeavor to make his escape in the first instance, and on failure of this, to meet the enemy; nor is he bound to lay by or fly until an attack is commenced upon him, and he has received injury, and then, and not before, to exert his right of self-defence. The law vests him with a large discretion for the benefit of all concerned. He is to consult the safety of the persons and property on board, in the best manner he can. He may lay to, or chase the enemy's ship, if he deem that the most effectual means of securing his object. It may be his best course to begin the attack, and to attempt to cripple the enemy, or to encourage his own crew by commencing a chase, or to intimidate the enemy by laying to, and showing a determination to resist any attack." Mr. *Phillips* mentions a subsequent suit between a shipper of goods and the owners of the vessel, in which it appeared "that the taking possession of the captured vessel was a defensive measure, for the purpose of preventing intelligence of the course of The Volant to British cruisers, whereby she might have been exposed to capture." It was accordingly held not to be a deviation. Gray *v.* Thorndike, Sup. Jud. Ct., Mass. Suffolk, Nov. T. 1817. 1 Phillips, Ins. § 1030. We have

effected, and the vessel sails from Boston for Liverpool, this is no deviation, because the policy never attaches. The voyage insured against never begins, although it is true that until the vessel leaves Boston harbor and passes the lower light, her route may be the same for both voyages.[1] But if a vessel, after being insured on such a voyage, receives goods on board to be left at Savannah on her way to New Orleans, and sails with this intention, it seems that it would be a sailing upon the voyage to New Orleans, with an intention to deviate from it as soon as the vessel reached that point, at which a vessel bound for Savannah would bear away for that port. The policy would therefore attach; and until the vessel actually changed her course there would be no deviation, and the insurers would be liable for a loss occurring while the vessel was on the route which she would have pursued had she been bound to New Orleans alone, but not for a loss which happened after she had entered upon a course which she takes only because she is bound to Savannah.[2]

examined the records of the court, but have been unable to find on what precise grounds the verdict of the jury was rendered. If a vessel on a fishing voyage has liberty to chase, capture, and man prizes, she cannot lie nine days off a port waiting for an enemy's ship to come out, although she should be during that time within the limits of her fishing-ground. Hibbert *v.* Halliday, 2 Taunt. 428. If liberty is given to see a prize into port, the ship will not be authorized to remain in port, while the prize is undergoing repair. Jarratt *v.* Ward, 1 Camp. 263. If a vessel has liberty to cruise and capture, she may convoy her prizes, if she does not go out of her course for that purpose, and the risk is not increased thereby. Ward *v.* Wood, 13 Mass. 539. But if the vessel shortens sail, or lays to in order to let the prize keep up with her, this is a deviation. Lawrence *v.* Sydebotham, 6 East, 45.

[1] Wooldrige *v.* Boydell, 1 Doug. 16; Tasker *v.* Cunninghame, 1 Bligh, 87; Way *v.* Modigliani, 2 T. R. 30. In Forbes *v.* Church, 3 Johns. Cas. 159, a cargo was insured from New York to Andero. The vessel cleared for Hamburg, but on the way she altered her course with the intention of proceeding to St. Andero, and going thence to Hamburg at a more favorable season, but was captured on the way. Held, that the voyage insured had never commenced. See Bain *v.* Kippen, Millar, Ins. 445, and cases in note *infra*.

[2] Foster *v.* Wilmer, 2 Stra. 1249; Carter *v.* Royal Exch. Ass. Co., id.; Thellusson *v.* Fergusson, 1 Doug. 361; Kewley *v.* Ryan, 2 H. Bl. 343; Hare *v.* Travis, 7 B. & C. 14; Marine Ins. Co. *v.* Tucker, 3 Cranch, 357; Thompson *v.* Alsop, 1 Root, 64; Henshaw *v.* Marine Ins. Co., 2 Caines, 274; Hobart *v.* Norton, 8 Pick. 159; Winter *v.* Delaware Mut. Ins. Co., 30 Penn. State, 334.

In Heselton *v.* Allnutt, 1 M. & S. 46, insurance was effected at and from Heligoland to Memel, with liberty to touch at any ports whatsoever. The captain sailed with written orders to go to Gottenburgh, and there ascertain whether he should pro-

In neither of these cases, perhaps, could any question arise; but it is obvious, that in other cases, which come as it were, between these, there might be much difficulty in determining, whether the vessel sailed on the voyage proposed but with the intention to deviate, or upon a different voyage. We know of no rule or principle, which could always answer this question. It seems to be one of mixed law and fact. We should say in general, that if the proposed change in the voyage, was sufficient in extent, quantity, and importance, to make it a change of the whole voyage from the beginning, then there was an abandonment of the voyage intended and the substitution of another; for it is quite certain that if a vessel sails *from* the place at which the insurance should attach and the risk commence, but not on the *voyage*

ceed to Anholt or Memel. The vessel was lost before she arrived at Gottenburgh. The underwriters were held liable on the ground that there was a good inception of the voyage from H. to M., subject to be changed according as circumstances might require. A similar question was presented in Lawrence *v.* Ocean Ins. Co., 11 Johns. 241, under circumstances somewhat more favorable for the underwriters, but they were nevertheless held liable. The risk was "at and from New York to Gottenburgh, and at and from thence to a port in the Baltic." On arrival at G. the assured elected St. Petersburg as the ultimate port of destination, and sailed for the same, but being compelled to go into Carlsham, the vessel wintered there, and before leaving, the supercargo determined to go to Stockholm instead of to St. Petersburg, and sailed for that port. While on the route common to the two, the vessel was captured. The Supreme Court held that this was but an intended deviation, and not an abandonment of the voyage. Of the five judges who at that time constituted the court, one dissented, and one gave no opinion, not having heard the arguments. On appeal to the Court of Errors, in a case against another company, depending on the same facts, the decision of the Supreme Court was affirmed, Chancellor *Kent*, dissenting. New York Firem. Ins. Co. *v.* Lawrence, 14 Johns. 46.

In Stocker *v.* Harris, 3 Mass. 409, the ship, cargo, and freight were insured from Boston to the Canaries, at and from thence to any port or ports in Spanish America, in the Atlantic or Ethiopic Ocean, at and from thence to her port of discharge in the United States. After performing her outward voyage, the vessel cleared with a cargo for the Havana. On the passage, but before she had left the track she must have taken if coming to the United States, the vessel was captured. The underwriters were held not to be liable.

The case of Silva *v.* Low, 1 Johns. Cas. 184, where the voyage was from Wilmington to Falmouth, and the master before the vessel sailed declared his intention to put into New York for seamen, and the underwriters were accordingly discharged, is not in conflict with the cases above cited. It was so decided, not on the ground of a deviation, but because this intention was considered as showing either that the vessel was unseaworthy when she left Wilmington, or that the seamen were not shipped for the whole voyage.

insured, the policy does not attach.[1] But, if the change be not enough for this, then it must be regarded only as an intention to deviate, which has no effect whatever upon the rights or obligations of either party, until it is carried into effect.

If the vessel sails with the intention not to go to the terminus to which she is insured, but to some other port or place, it would seem to be very difficult to construe this as a mere intention to deviate, or as any thing less than another voyage, although the vessel sail through much the larger part of her course in the direction which led to the proper terminus; although, perhaps even here, if the change took place only at a very short distance, the two ports being very near to each other, this might be construed as the same voyage, with an intention to deviate; but we should prefer the former construction even in this case.[2] If the ship actually sails on the voyage intended, the fact that she cleared for a different voyage does not discharge the insurers.[3]

[1] Sellar *v.* M'Vicar, 4 B. & P. 23. So, in Lippincourt *v.* La. Ins. Co., 2 La. 399, an insurance for six months trading between New Orleans, and any port in the West Indies, United States, or Gulf of Mexico, was held not to protect a voyage between the West Indies and a port in the United States other than New Orleans.

[2] In Marine Ins. Co. *v.* Tucker, 3 Cranch, 357, Mr. Justice *Johnson* said: "The ordinary rule for ascertaining the identity of a voyage insured, is by adverting to the termini. A rule which is certainly correct as far as it extends, but in the rigid application of which, it is easy to conceive that cases may occur, in which it would bear injuriously upon the insurer. If it has any defect, it is in not extending far enough, the claim to indemnity, as the terminus *ad quem* may, in many instances, be relinquished without any possible increase of risk, or even without varying the risk, excepting only as to lessening its duration. I will instance the case of an insurance from America to St. Petersburg, when the vessel, in fact, is to terminate her voyage at Copenhagen; or the case of an insurance to Alexandria, in Virginia, when the vessel is to terminate her voyage at Georgetown, in Maryland." But see Marine Ins. Co. *v.* Stras, 1 Munf. 408, where the taking a return cargo to Norfolk, in Virginia, instead of to Richmond in the same State, which latter was her port of destination, was held a deviation.

[3] Planché *v.* Fletcher, 1 Doug. 251; Barnewall *v.* Church, 1 Caines, 217; Talcot *v.* Marine Ins. Co., 2 Johns. 130; McFee *v.* South Carolina Ins. Co., 2 McCord, 503. In Winter *v.* Delaware Mut. Ins. Co., 30 Penn. State, 334, the vessel was compelled to put into an intermediate port for repairs, and the master could only obtain money for that purpose by giving a bottomry bond payable on the arrival of the vessel at a port, other than that to which she was insured. She accordingly was repaired and sailed for the substituted port. It was held, that while she was still on the track to the original port of destination, there was merely an intention to deviate, and not an abandonment of

It may be added, that after a deviation has taken place, the forfeiture incurred by it may be waived by an agreement to that effect.[1]

the original voyage, if the jury should find that the intention was, after leaving the substituted port, to proceed to the original port of destination.

[1] Warren *v.* Ocean Ins. Co., 16 Maine, 439; Crowningshield *v.* New York Ins. Co., 3 Johns. Cas. 142. In Glidden *v.* Manufacturers' Ins. Co., 1 Sumner, 232, the vessel was insured from Newcastle, Maine, to her port of discharge in Martinique, and at and from thence to her port of discharge in the United States. The vessel went to Mariegalante, took on board a return cargo and sailed for Damariscotta, Maine. She touched at St. Eustatia, and was afterwards lost on the way to Damariscotta. After it was known that the vessel had been at St. Eustatia, the following memorandum was added to the policy by consent: "It is now understood that the within insured vessel has been to St. Eustatia, and sailed thence for Boston about twenty-five days since, which deviation shall not prejudice the within insurance." *Story*, J., said: "The question is, whether this memorandum helps the plaintiff's case. I am of opinion it does not. In the first place, it waives nothing more than the deviation from the voyage, by going to St. Eustatia, and not that by going to Mariegalante and not going to Martinique. In the next place, this waiver is only upon a statement in the memorandum, that the voyage was from St. Eustatia to Boston; whereas, it was in fact, to Damariscotta." It has been held, that if a vessel is insured after the voyage has commenced, but the risk is to begin from the commencement of the voyage, the underwriters are discharged by a deviation, although they knew of it when the policy was made. Redman *v.* Lowdon, 5 Taunt. 462, 1 Marsh. 136, 3 Camp. 503.

CHAPTER IX.

OF THE TERMINI OF THE VOYAGE, AND OF THE RISK.

SECTION I.

THAT THESE TERMINI MUST BE DISTINCTLY STATED.

In the preceding chapter, we have seen the importance of ascertaining the termini of the voyage, because, on this, may sometimes depend the question of deviation. A more frequent reference to the termini is required for the purpose of deciding whether a loss has happened before, after, or during the voyage insured, or the risk insured against.

The first rule on this subject is, that the policy must state specifically what these termini are. Thus, a policy from —— to —— or from —— to A., or from A. to ——, is incomplete, and never attaches.[1] So it would be, if the termini are named and described, but in such a way as has no meaning, or leaves a substantial doubt as to what is meant by the description.

[1] Molloy, book 2, c. 7, § 14. See also, Manly *v.* United M. & F. Ins. Co., 9 Mass. 85, 89, per *Sewall*, J. In Folsom *v.* Merchants' Mut. M. Ins. Co., 38 Maine, 414, insurance was effected "on the outfits of schooner Pilot, for a fishing voyage to the Banks and back to a port of discharge in the United States." It was held, that though the commencement and termination of the risk were not distinctly stated, yet the policy was valid, if the intention of the parties could be satisfactorily gathered from its provisions, and that any obscurity could be removed by reference to the situation of the parties, and evidence that the vessel was at a certain port when the policy was executed, and there took on board the property insured and sailed from thence on the voyage, was admitted to determine the terminus *a quo*. In Cleveland *v.* Union Ins. Co., 8 Mass. 308, it was contended that the description "at and from Salem to any port or ports, place or places, backwards and forwards, round the globe, one or more

SECTION II.

OF THE COMMENCEMENT OF THE RISK.

To determine when the risk begins, the date of the policy is sometimes important; for it takes effect from that date, although the insurers do not deliver it to the insured until afterwards, if the contract were fully made at the time of the date.[1]

The insurers can, if such be the intention and agreement, make themselves responsible for a loss which has already happened when the policy is made, and even if that loss be total, so that the subject-matter of the insurance is then non-existent. This is usually done by the words, "lost or not lost," which are introduced into most policies;[2] but any language indicating the same purpose, would have the same effect. Nor is there any sufficient reason why this already existing loss should be wholly unknown to both parties. If known to the insured, he must of course communicate it; but then, if neither the amount, nor any circumstances which would determine the amount, are known, the insurers may, if they please, take this risk upon themselves.[3] So, too, if insurance is effected on goods "lost or not lost," the underwriters are liable for a partial loss which took place before the insured acquired any interest in the goods.[4] If a policy is to take effect on the occurrence of a certain event, it will attach, although the event has taken place before the date of the policy, if at the time of the date, the subject insured is in the condition described in the policy.[5]

times, during her stay and trade at all such places, until her return to her port of discharge in the United States," was too loose and indefinite, but the court held it to be sufficient.

[1] See ante, p. 21, n. 2; p. 28, n. 5.

[2] See ante, p. 77, n. 4.

[3] Mead *v.* Davison, 3 A. & E. 303.

[4] Sutherland *v.* Pratt, 11 M. & W. 296, *Parke*, B., said: "It operates just in the same way as if the plaintiff having purchased goods at sea, the defendant (the insurer), for a premium, had agreed, that if the goods had at the time of the purchase sustained any damage by perils of the sea, he would make it good."

[5] Cobb *v.* New England Mutual M. Ins. Co., 6 Gray, 192. The insurance in this

If insurance is made to commence "on" a certain day, it begins at the beginning of the day, and covers all losses occurring in any part of it. If the word used be "from" a certain day, strictly speaking, it should exclude the whole of that day; and such would be the construction, if there are no facts or admissible evidence to control it.[1] A distinction has been taken between "from the date," which is held to include the day, and "from the day of the date," which excludes it.[2] But this distinction seems almost too nice for practical use; and we should say that either of these phrases, or any one of like character, would be always open to construction upon the evidence, and the circumstances of each case.[3]

If the insurance be on goods, the policy attaches to them when it would attach to the vessel carrying them, if she were insured. If the risk is to begin at a certain time, and this be definitely fixed, and the policy also provides that the insurance shall begin upon the ship "at" a certain place, the policy may

case was, "lost or not lost, $10,000 on the barque Esperanza, building at Perry, to take effect as soon as water-borne." The policy was executed November 15, and the vessel was launched on the preceding day. It was contended, that the policy was to attach only on the happening of an event subsequent, namely, the vessel being water-borne, but the court held, that even if the words "lost or not lost" did not make the policy attach the moment the vessel was water-borne, yet that as the vessel was in the situation described when the policy was executed, the policy attached from that time.

[1] In Chiles *v.* Smith, 13 B. Mon. 460, it was held, that if time is to be computed from an act done, the day on which the act was done must be included, but if the computation is to be made from the day itself, then the day must be excluded, on the authority of Bellasis *v.* Hester, 1 Ld. Raym. 280. In Lorent *v.* South Carolina Ins. Co., 1 Nott & McC. 505, the question was, whether a policy issued on the day of the passage of the embargo act, was valid or not. The embargo was laid for the term of ninety days, from and after the passage of the act. The court held, that it did not go into operation till the day after the passage of it, and the policy was, therefore, valid.

[2] Sir Robert Howard's case, 2 Salk. 625.

[3] This subject was elaborately considered by Lord *Mansfield*, C. J., in Pugh *v.* Leeds, Cowp. 714. He held, that the word "from," might be either inclusive or exclusive, according to the context and subject-matter, and that "the day," and "the day of the date," meant in every case the same thing, and said: "The date is a memorandum of the day when the deed was delivered. In Latin it is '*datum*,' and '*datum tali die*' is, delivered on such a day. Then, in point of law, there is no fraction of a day; it is an indivisible point. What is 'the day of the date?' It is 'the day the deed is delivered.' 'The date,' therefore, being also defined to be the day the deed is delivered; 'the date,' and 'the day of the date,' must mean the same thing. The day of the date is only a superfluous expression."

attach at that time, although the ship be at another place, if the whole policy and all the circumstances make it certain that the name of the place is either surplusage or a mere term of description.[1]

If the words used be "at and from" a certain place, to which the ship is sailing, the risk begins when the vessel is at that place, in such condition as is contemplated by the policy; and, in general, this must be a safe condition. It is said, indeed, that the policy does not attach, unless the vessel is there in safety.[2] But we do not see that she needs, always, to be there in safety. If, for instance, one policy insures her "to" such a place, and a second is made upon her "at" that place, for the obvious pur-

[1] Manly *v.* United Mar. & F. Ins. Co., 9 Mass. 85. In Martin *v.* Fishing Ins. Co. 20 Pick. 389, a vessel was insured "at and from Calais, Maine, on the 16th day of July, at noon, to, at, and from all ports and places, to which she may proceed in the coasting business, for six months." The court held, that the policy attached, although there was no evidence that the vessel was at, or prosecuting her voyage from Calais on the day named. See also, Grousset *v.* Sea Ins. Co., 24 Wend. 209. And in Kent *v.* Manuf. Ins. Co., 18 Pick. 19, the vessel was insured at and from Boston to certain places. The policy was dated October 18th. There was a previous policy on time, for one year, which expired October 20th. The vessel sailed from Boston on the 18th or 19th of October and was never heard from. The court held, that the second policy attached on the 20th of October, although the vessel was at sea, and if she was lost after that time the underwriters were liable.

[2] Upon the question, whether the risk on a ship "at and from" a port commences on her arrival, or whether it begins when she has been moored twenty-four hours in safety, see Garrigues *v.* Coxe, 1 Binn. 592, where the latter rule was adopted. In Patrick *v.* Ludlow, 3 Johns. Cas. 10, 14, *Kent*, J., said: "The true rule on this subject is, that at and from, when applied to a ship, includes the period of her stay in the port from the time of her arrival there." The question before the court was distinct from this, and the remarks of the learned judge were altogether *obiter*. In Motteux *v.* London Ass. Co., 1 Atk. 545, 548, Lord Chancellor *Hardwicke* said: "There was a case before me, upon a trial at Guildhall, where it was then debated, whether the words 'at and from Bengal to England,' meant the first arrival of the ship at Bengal? And it was agreed that the words 'first arrival' were implied and always understood in policies." It is to be observed in regard to this case, that the Chancellor did not intend to distinguish between the moment of arrival and the being moored twenty-four hours, but the case was mentioned as bearing on the question, whether under the words used, the assured might leave the port, make an intermediate voyage and then return and sail for the port of destination.

See also, Parmeter *v.* Cousins, 2 Camp. 235, in which Lord *Ellenborough*, C. J. held, that the policy did not attach until the ship was in safety. See ante, p. 144, n. 5. And in Bell *v.* Bell, 2 Camp. 475, 478, Lord *Ellenborough* said: "The safety required to give a good commencement to the risk on the ship, is a physical safety from the perils insured against, and not a freedom from political danger."

pose of attaching when the first ceases, and the ship arrives at the place in a violent and dangerous storm, which continues until the first policy is discharged, we do not see that the danger prevents the second policy from attaching.[1] The greater part of the policies of the present day contain a clause, by reason of which, the outward voyage does not expire till the vessel has been moored twenty-four hours in safety. And this question would not then arise.

If the words are "at and from" a certain port, although the insurance begins only at that port, the word may comprehend an open roadstead, or any places included naturally or usually within the port named, as places at which vessels receiving cargoes, are considered as "at" the port. It is sometimes a difficult question of mixed law and fact, whether a certain place is really within the scope of the word "Port," or is a part of a place named; and this question can only be answered by usage and the nature of the case.[2]

The words "at and from" are often, if not always, especially in a home port, intended to cover a ship while in the port pre-

[1] If the policy on the homeward voyage is stated to be in continuance of the policy on the outward, it would certainly take effect on the termination of the outward, but perhaps not otherwise. See post, p. 317, note 3.

[2] De Longuemere *v.* Firem. Ins. Co., 10 Johns. 126. In Higgins *v.* Aguilar, cited 2 Taunt. 406, on a policy, at and from Demerara to London, it was held, that a loading at Essequibo was a loading at Demerara. This was decided upon the particular usage of the trade. And in McCargo *v.* Merchants' Ins. Co., 10 Rob. La. 334, slaves, taken on board in Hampton Roads, were held to come within a policy "at and from Norfolk." So insurance on goods at and from the ship's loading port or ports in Amelia Island, will cover goods taken in at Tigre Island, there being no port at Amelia Island, and the usage of the trade being for ships to go at Tigre Island to take on board their cargoes and then clear from Amelia Island. Moxon *v.* Atkins, 3 Camp. 200. So, Grass Island has been held to be within the port of Limerick. Bell *v.* Mar. Ins. Co., 8 S. & R. 98. See, generally, as to the meaning of the word port, Hull Dock Co. *v.* Browne, 2 B. & Ad. 43; Stockton R. Co. *v.* Barrett, 7 Man. & G. 870, and post, p. 328, n. 1.

In Payne *v.* Hutchinson, 2 Taunt. 405, note, goods were insured "at and from Caermarthen to London." The vessel took in her cargo at Llanelly and sailed thence for London. Llanelly is a member of the port of Caermarthen, but there is a distinct custom-house at each of these places. Caermarthen lies higher up the river, and is accessible only by an intricate navigation. The vessel cleared at L. It was held, that the risk had not commenced. See also, Constable *v.* Noble, 2 Taunt. 403; Brown *v.* Tayleur, 4 A. & E. 241.

paring for her voyage, as well as after she begins it. And there may not only be a "deviation" in the port, springing from unreasonable slowness or entire suspension of the preparations, but the policy may never attach from the want of the preparations, or its attachment be delayed by a delay in the preparations; so that where a vessel has been a long time in a port, the risk seems not to commence until preparations are begun for the voyage insured.[1]

If the insurance be "from" only, and not "at," it does not begin until the vessel leaves the port or place; that is, weighs anchor, or casts off her moorings with the preparations which she purposes, made, and with the intention of sailing.[2] But the word "from" has a more extended meaning when applied to an intermediate port. Thus, if a vessel be insured at and from A. to B., *from* thence to C. and back to A., a loss at B. will be covered.[3]

If the insurance is on goods "at and from" a place, it does not begin (unless expressly so provided in the policy),[4] until

[1] Seamans *v.* Loring, 1 Mason, 127, 140; Kemble *v.* Bowne, 1 Caines, 75. See also, ante, p. 282, note 2. In Lambert *v.* Liddard, 5 Taunt. 480, a vessel which was then cruising, was insured "at and from Pernambuco or any other port or ports in the Brazils, to London, beginning the adventure on the termination of the cruise, and preparing for her voyage to London." The vessel, at the end of the cruise, was off the coast of Brazil to the northward of Pernambuco. The master sent a boat ashore to see if a cargo could be obtained at Pernambuco, and finding that it could not, he set sail for St. Salvador, for the purpose of obtaining a cargo, and the vessel was lost on the way. It was held, that the risk attached from the time the master sent the boat ashore, on the termination of the cruise, that being considered preparing for the voyage within the policy.

[2] See Mey *v.* South Carolina Ins. Co., 3 Brev. 329, and cases ante, p. 124–129.

[3] Bradley *v.* Nashville Ins. Co., 3 La. Ann. 708. In Bell *v.* Marine Ins. Co., 8 S. & R. 98, a vessel was insured at and from Philadelphia to Cork and back to Philadelphia. After discharging her outward cargo at Cork, the vessel went to Limerick, and the captain wrote home, communicating this fact, and stating that his ship was then lying at Grass Island. This letter was shown to the underwriter, who thereupon made the following memorandum on the policy: "It being represented by the assured, that The Amiable was ordered from Cork to Limerick and had arrived there, it is hereby agreed that for a further consideration of one per cent., we engage to see the said ship from thence, instead of Cork, back to Philadelphia." The court held that the vessel was covered while at L., as well as from that port, such being the manifest intention of the parties.

[4] See Kennebec Co. *v.* Augusta Ins. and Banking Co., 6 Gray, 204.

the goods come under a marine risk; that is, until they are laden on board the vessel, or whatever else, as a boat or lighter, it is customary to use in lading them.[1] And this applies equally to insurance against lake or river risks. In some cases of insurance on goods, these words, "to begin from the loading of the goods on board," are held to define the terminus *a quo*, so distinctly, that if there be no lading at the designated place, there is no such terminus, and no beginning of the insurance. So, if there were insurance on cargo on a voyage from A. to B., beginning the adventure from the lading of the goods on board at A., if the goods are laden on board before the vessel reaches A., and are not reladen at A., the adventure never begins, and the policy never attaches.[2] And, even if the goods are insured from A. to B., beginning the adventure from the loading of the goods, without specifying where, the policy does not attach, unless the goods are laden at A.[3] If similar words are used, they are *primâ facie* subject to this construction, as the only *grammatical* construction. There are, however, many cases in which it is obvious that they are not used, either in this sense, or for this purpose; but only as words of description, which are to be considered, construed, and applied in connection with the language of the whole policy, and all the circumstances of the case. And if these make it apparent that it was not the intention of the parties to make the attachment of the policy dependent upon the fact of the loading, it would seem to us a departure,

[1] In Coggeshall *v.* Am. Ins. Co., 3 Wend. 283, the vessel was on a trading voyage on the western coast of South America. The policy covered goods laden on board the vessel during a specified period. Within this time a basket of virgin silver was lost while being brought from the shore to the vessel in a flat boat. Held, that this being the customary mode of taking goods on board, the underwriters were liable. So, during the voyage, goods in boats are as much protected while the boats are "employed as auxiliary to the legitimate purpose of the voyage," as they are while on board the ship. Parsons *v.* Mass. F. & M. Ins. Co., 6 Mass. 197, 208.

[2] Hodgson *v.* Richardson, 1 W. Bl. 463; Horneyer *v.* Lushington, 15 East, 46, 3 Camp. 85; Robertson *v.* French, 4 East, 130; Grant *v.* Paxton, 1 Taunt. 463; Park *v.* Hammond, 6 Taunt. 495; Rickman *v.* Carstairs, 5 B. & Ad. 651, 2 Nev. & M. 562; Graves *v.* Marine Ins. Co., 2 Caines, 339; Scriba *v.* Ins. Co. of N. A., 2 Wash. C. C. 107; Richards *v.* Marine Ins. Co., 3 Johns. 307.

[3] Spitta *v.* Woodman, 2 Taunt. 416; Mellish *v.* Allnutt, 2 M. & S. 106; Langhorn *v.* Hardy, 4 Taunt. 628. See also, the next note.

not only from natural justice, but from the true and rational principles of commercial law, to give these words this construction and effect.[1] The fact that the cargo is valued, is

[1] In Bell *v.* Hobson, 16 East, 240, 3 Camp. 272, goods were insured at and from Gottenburg to any port in the Baltic, beginning the adventure from the loading of the goods on board. The policy was declared to be in continuation of other policies which were on the same goods from Virginia to any port in the United Kingdom, but the defendant was not an underwriter upon any of the former policies. Lord *Ellenborough*, C. J., said: "A very strict, and certainly a construction not to be favored, and still less to be extended, was adopted in the case of Spitta *v.* Woodman, where it was holden that the words, 'beginning the adventure from the loading on board,' were to be confined to the place from whence the risk commenced. But if there be any thing to indicate that a prior loading was contemplated by the parties, it will release the case from that strict construction. Then, can there be any thing more indicative of such an understanding between the parties, than the statement made at the foot of this policy, that it was in continuation of former policies, which were distinctly upon a voyage from Virginia. This was taking up the voyage from a period in the former policies. The conclusion, therefore, which was drawn in Spitta *v.* Woodman, is completely rebutted by the reference in this policy to an antecedent loading."

In Spitta *v.* Woodman, 2 Taunt. 416, the defendant had insured the same goods from London to Gottenburg, the outward voyage, and therefore knew that the subsequent policy was on the same goods, but notwithstanding this, he was exonerated. So, in Langhorn *v.* Hardy, 4 Taunt. 628, where the jury expressly found that the defendant knew at the time of executing the policy, that the cargo was put on board at London, and was intended to continue on board during the voyage insured, the policy describing the risk to commence from the loading of the goods on board at Gottenburg. The case of Vredenbergh *v.* Gracie, decided Jan. T. 1799, 4 Johns. 444, note, and referred to in Graves *v.* Marine Ins. Co., 2 Caines, 339, 342, was this, goods were insured on board the brig Nancy, at and from any port or ports in the West Indies and at and from thence to New York, "beginning the adventure on the said goods from the loading thereof on board in the West Indies." The goods were shipped in New York, and were not insured on the outward voyage. At the time of the insurance, the vessel was in the West Indies, and the underwriter was informed that the goods were shipped in New York, a letter was also shown him, in which it was stated that the vessel had arrived at Cape Nicola Mole, and after disposing of part of her cargo there, had proceeded to St. Marks with the rest. "It was also," says *Thompson*, J., in 2 Caines, 342, "by the express understanding of the underwriter, a policy on goods shipped at New York, and the vessel being already in the West Indies, that part of the world was only mentioned as the place where the risk was to commence."

In Gladstone *v.* Clay, 1 M. & S. 418, goods were insured "at and from Pernambuco to Maranham, and at and from thence to Liverpool, beginning the adventure from the loading of the goods wheresoever, etc." The underwriter was held liable for loss happening to the goods, on the voyage between Pernambuco and Maranham, although the goods were laden at London.

In regard to what is to be considered as a loading at the port at which the risk is to commence, see Nonnen *v.* Reid, 16 East, 176, where part of the goods were unloaded and landed on the wharf, sufficient in quantity to enable the custom-house officers to

not evidence that the risk was to attach on the outward cargo.[1]

It is very clear, that if goods are insured "at and from" a certain place; they are covered, although previously loaded at another place.[2] And goods subsequently loaded are covered, if such is the manifest intention of the parties, although the risk was to commence from the loading on board at the port of departure.[3]

The word "at," especially in connection with "to" and "from" may apply to an island, or region of coast or district, in such a way as to cover the vessel while sailing from port to port, or

examine the whole cargo on board, and then that taken out was reladen. This was considered as a reloading of the whole. In Murray *v.* Col. Ins. Co., 11 Johns. 302, the whole cargo was hoisted on deck at the loading port, in order to take on board some salt as ballast, and it was then examined and restowed. It was held, that the policy attached on the salt only.

[1] Rickman *v.* Carstairs, 5 B. & Ad. 651.

[2] Gardner *v.* Col. Ins. Co., 2 Cranch, C. C. 473. The voyage described in the policy was, "at and from Rio Janeiro to Santos, and two ports in South America, and at and from either of them to a port of discharge in the West Indies, or Europe, or the United States," and the risk was declared to be on goods, "at and from Rio Janeiro until safely landed at Santos." It was held, that goods laden on board at Cadiz, which were lost between Rio Janeiro and Santos, were covered.

[3] In Grant *v.* Delacour, 3 Taunt. 466, "the policy was at and from London to all ports and places, on this side, and on the other side of the Cape of Good Hope, forwards and backwards at sea, at all times, on all services, and in all ports and places, until the ship's safe arrival back again at her last station of discharge at Blackwall, or Deptford, upon any kind of goods in the Brunswick, beginning the adventure upon the said goods from the loading thereof on board the said ship at London, and so should continue." The court held, that though these words literally applied only to goods taken on board at London, yet, as the course of such a voyage was to trade away the goods taken out, the words would apply to any goods, acquired by trading, wherever loaded on board. But in Grant *v.* Paxton, 1 Taunt. 463, where goods were insured "at and from China to all or any ports or places whatsoever and wheresoever in the East Indies, Persia, or elsewhere, beyond the Cape of Good Hope, in port and at sea, in all places, at all times, and in all services, until the ship's safe arrival at London," which was not the last place of discharge, the court held, that only goods put on board at China, were covered, and not those loaded elsewhere on the voyage from China to London.

Insurance on goods at and from Plymouth to Malta, with liberty to touch at Penzance for any purpose whatever, beginning the adventure from the loading thereof on board as aforesaid, will cover goods taken on board at Penzance. Violett *v.* Allnutt, 3 Taunt. 419. See also, Barclay *v.* Stirling, 5 M. & S. 6; Hunter *v.* Leathley, 10 B. & C. 858, 7 Bing. 517.

place to place within that district. Whether it shall have this effect must depend upon the construction which is required by usage, by the context of the policy, and by the facts of the case.[1]

If the insurance be on a certain voyage, the presumption of law — liable to be rebutted only by very strong evidence — would confine this to the *next* voyage which comes under this description.[2] But the attachment of the policy may be delayed, and not prevented, by a different voyage previously, under circumstances of necessity or compulsion,[3] or by a voyage permitted by usage.[4]

SECTION III.

OF THE TERMINATION OF THE RISK.

Insurance *to* a place, or to a port of discharge, or until arrival in port, must terminate at the first place or port of arrival, which distinctly and certainly answers to the description. But, if the ship reaches a port only for the purposes of inquiry or advice, and leaves it at once, or is instantly ordered by the owners to another port, there to discharge the cargo, the first port would not be a port of discharge.[5] And, if the phrase be "a final port,"

[1] Dickey *v.* Baltimore Ins. Co., 7 Cranch, 327; Cruikshank *v.* Janson, 2 Taunt. 301; Camden *v.* Cowley, 1 W. Bl. 417; Warre *v.* Miller, 4 B. & C. 538.

[2] Courtenay *v.* Miss. M. & F. Ins. Co., 12 La. 233.

[3] Driscol *v.* Passmore, 1 B. & P. 200.

[4] See ante, p. 281, n. 2.

[5] Coolidge *v.* Gray, 8 Mass. 527; Lapham *v.* Atlas Ins. Co., 24 Pick. 1; King *v.* Middletown Ins. Co., 1 Conn. 184; Sage *v.* Middletown Ins. Co., 1 Conn. 239; King *v.* Hartford Ins. Co., 1 Conn. 333. And where a vessel is insured to two ports, either or both, she may put into a third port to inquire as to the state of the markets at these ports. Clark *v.* United F. & M. Ins. Co., 7 Mass. 365. In King *v.* Middletown Ins. Co., a ship was insured on her homeward voyage to a port of discharge in the United States. She cleared for, and arrived at New York. As soon as the owner heard of her arrival, he ordered her to proceed to Middletown. To enable her to sail up the river, part of the cargo was taken out to lighten her. The cargo was entered at the custom-house and the duties paid. On the way to Middletown, the vessel was

or to "ports of discharge," the insurance will cease upon such parts of the cargo as are landed at one port or another, but not on those remaining on board and in the ship, until the port is reached at which the whole of the cargo remaining is to be discharged.[1] And whatever port may have been intended by the

wrecked, and the underwriters were held liable, on the ground that neither the clearing for New York, the arrival there, nor the waiting for orders and lightening the vessel, constituted New York the port of discharge, although it was said, that the unlading of the cargo would have had this effect. In Sage *v.* Middletown Ins. Co., it was held, that the unlading of part of the cargo, which was in a perishing condition, while waiting for orders, would not terminate the risk. And if the crew is discharged and another immediately reshipped at such a port, the underwriter is still liable for a subsequent loss. King *v.* Hartford Ins. Co., *supra.*

[1] Inglis *v.* Vaux, 3 Camp. 437; Preston *v.* Greenwood, 4 Doug. 28. In Moore *v.* Taylor, 1 A. & E. 25, a ship was insured at and from St. Vincent, Barbadoes, and all or any of the West India islands, to her port or ports of discharge and loading in the United Kingdom, during her stay there and thence back to Barbadoes and all or any of the West Indies, until the ship should arrive at her final port, as aforesaid. The vessel took in a cargo at Liverpool and discharged the same at Barbadoes, except some coal and brick, which the jury found were kept on board merely for ballast. Held, that the risk ended as soon as the cargo was delivered, and did not continue while the ship, in ballast, was seeking for a new cargo. And in Upton *v.* Salem Comm. Ins. Co., 8 Met. 605, the court held, where a vessel was insured at and from Salem to her port or ports of discharge on the river La Plata, that the risk terminated when the cargo was substantially discharged. In Richardson *v.* London Ass. Co., 4 Camp. 94, goods, the investment of the captain, were insured on an East India voyage, until their arrival at the last place of discharge on the outward voyage. The captain landed the whole of his investment at Calcutta, sold part, but not being able to find purchasers for the residue, determined to carry it on for a new market. The outward cargo had all been discharged, and the vessel was ordered to make an intermediate voyage to Madras, under the usual clause in the charter-party. On the voyage, the goods were lost. Held, that the risk, being on the outward voyage merely, had terminated. In Brown *v.* Vigne, 12 East, 283, a ship was insured to any port or ports in the River Plata, until her arrival at her last port of discharge. The master intended to discharge at Buenos Ayres, but that place being in the hands of the enemy, he went to Monte Video, with the intent to make a full discharge there, if the market were favorable. But not finding the market there so favorable as he expected, he determined to go to Buenos Ayres, if it should be practicable, but while discharging his cargo a loss happened. The court held, that as he could not legally go to Buenos Ayres, that place being in possession of the enemy, Monte Video was to be considered as the last port of discharge, and on the arrival of the vessel there, the risk terminated. In Oliverson *v.* Brightman, 8 Q. B. 781, the goods were insured at and from Liverpool to Lintin, Hong Kong, Macao, Canton, or any other ports, etc., with liberty to transship or reship on board any other vessel at or off any of the ports above mentioned, and with leave for that vessel to proceed, and discharge the goods at any of the places above mentioned, or to remain there till it should be deemed expedient to proceed, "continuing the risk by land and water, until the goods should be arrived at their final port of destination." Before the arrival

parties, the port where the cargo is actually unladen from the ship, is "the port of discharge," and such a policy therefore terminates.[1]

The phrase, "at sea," seems to be held as covering every place where the ship may be, from the commencement to the termination of the voyage insured, although during parts of it she may have been actually anchored in ports, for shelter or otherwise. And the phrase "on a passage" has been held to be of equivalent import with "at sea."[2] But, perhaps, this construction should be

of the vessel at Macao, hostilities had taken place between the Chinese and the English, who in May had stormed Canton, but hostilities had been suspended, though peace was not declared till a year later. There had been no formal declaration of war. It not being considered safe for the ship to proceed to Canton, another ship was chartered to accompany her to Hong Kong in order that the goods might be transshipped and examined and kept there till they could be sent to Canton, or some other market. There was no market at Hong Kong, and it was not intended to make it the final place of deposit for sale. While the goods were on board the second ship, they were lost by a peril of the seas, and the underwriters were held liable. In Stephens *v.* Beverly Ins. Co., Sup. Jud. Ct., Mass., Essex, 1820, where a vessel was insured from Beverly to Bilboa, or a port of discharge in Europe, it was held, that the vessel could go only to Bilboa *or* some other port, and not to both.

[1] In Moffat *v.* Ward, 4 Doug. 31, note, it appeared that the ship had unloaded all of her cargo at Madras, and was afterwards lost on her way to Bengal. The underwriters were exonerated, on the ground that the last port of discharge, was not the port where she was originally destined to discharge part of her cargo, but that at which it was in fact discharged. In Shapley *v.* Tappan, 9 Mass. 20, the ship was insured from Boston to Tonningen, for the purpose of carrying a cargo there. She was driven by a storm into the River Elbe, seized at Gluckstadt, and afterwards liberated, and the cargo delivered to the consignee there, by his consent. Held, that the risk was then terminated.

[2] Bowen *v.* Hope Ins. Co., and The Same *v.* Merchants Ins. Co., 20 Pick. 275, were two cases argued and decided as one. In the one the ship was insured for a year, and if "at sea" when the year expired, then until her arrival at port. In the second, the insurance was the same, excepting that the phrase "if at sea" was in this latter case, "if on her passage." The year ended the 6th of October, 1834. On September 25, the ship being at Bangor, in Wales, with her cargo on board, weighed anchor with the intention of proceeding to Boston, and dropped down several miles below Bangor, but not being able to get out of the Straits of Menai (on which Bangor is situated), on account of head winds, came to anchor; and on several days attempted to get out of the straits, but did not succeed until the 8th of October. *Shaw*, C. J., said: "The term 'at sea' may have different meanings, according to the connection in which it is used. Here it is used in contradistinction to 'arrival in port.' If the vessel has sailed, or commenced a voyage from one port to another, she must be considered to be at sea, within the meaning of this clause, from the commencement to the termination of that voyage, although during parts of it she may have sought shelter in a place on the way. In the other policy, the contingency upon which the risk is to con-

applied especially to the case of a ship which, by the policy, is to be insured on a certain day "if at sea;" in which case it may be reasonable to consider the word as meaning only, "not at home." It is generally provided in time policies, that if the vessel be "at sea" at the expiration of the time agreed on, the risk shall continue until her arrival at a port of discharge, or at her port of destination.[1] If, then, before the expiration of the time, she has actually broken ground for the voyage; or if she has sailed and is, when the time expires, in a port of necessity; she is considered "at sea," and is covered by the policy

tinue at the end of the year, is a little differently expressed, the words being, if the vessel shall then be 'on a passage.' We think the meaning and legal effect are the same in this as in the other policy."

[1] In Wood *v.* New Eng. Mar. Ins. Co., 14 Mass. 31, a vessel was insured for twelve months, commencing on the 30th of December, from Newburyport to every place to which she might proceed, the risk to continue until the vessel should arrive, and be moored twenty-four hours in safety, or until the expiration of twelve months. It was further provided that if the vessel should be at sea at the expiration of the above period, the risk should continue until her arrival at a port of discharge. On the 14th of the following November the vessel sailed on a voyage from Beverly for Amsterdam, and on the 14th of December was captured and carried into port, where she was detained until after the expiration of the twelve months, when the vessel was liberated, and sailed for Amsterdam. On the way she was captured. *Parker*, C. J., in delivering the opinion of the court, said: "At the expiration of the year, the ship was not literally at sea; but was in a British port, whither she had been carried against the will of the master. Was she then, within a fair construction of the contract, within the intent of the parties, at sea? We think she was. She was absent on a voyage, which had been commenced within the time of the original risk. She would have been protected, upon that voyage, to Amsterdam and back again, because within the common meaning of the term *at sea*, which was undoubtedly adopted by these parties. A vessel is considered in that condition, while on her voyage, and pursuing the business of it, although during part of the time she is necessarily within some port, in the prosecution of her voyage. The intention in prolonging the risk beyond twelve months, was unquestionably to give the ship protection under the policy, in case that time should expire, while the vessel should be employed in some unfinished voyage: and whether in a foreign port, or actually upon the high seas, we believe there was no difference in the contemplation of the parties, when the contract was made." We consider this case as having been correctly decided, but the language used by the court, as given above, went further than the facts of the case required, and cannot, it seems to us, with all deference to the learned judge who pronounced the opinion, be supported by principle or authority, for the risk was to continue only to *a* port of discharge, and not to *the* port, which might perhaps be construed as meaning the final port of discharge. See Bowen *v.* Hope Ins. Co., 20 Pick. 275, cited in the preceding note.

The dictum of *Parker*, C. J., cited above, is directly opposed to a case decided in New York. American Ins. Co. *v.* Hutton, 24 Wend. 330, affirmed Hutton *v.* American Ins. Co., 7 Hill, 321. In this case a vessel was insured for a year, commencing

until her arrival at her port of final destination, or at her port of destination in a particular country, provided the master does not unnecessarily delay his voyage thither after the time has expired.[1]

If the insurance be to "a port" in a certain island or coast, or

January 21; if at sea at the expiration of the term, the risk was to continue until the arrival of the vessel at her port of destination, but the policy did not mention what the port was. The vessel sailed from New York on a voyage for St. Barts, Curaçoa, and Maracaibo, and thence back to the port of New York. Maracaibo being in a state of insurrection, the vessel put into St. Thomas for the purpose of taking a cargo thence to Philadelphia or New York. She arrived at St. Thomas on the 6th of January, but extensive repairs being required, she was detained there for that purpose until after the 21st. After she was repaired, she took in her cargo, and sailed on the 30th of January, and was lost February 18. If the repairs had not been necessary, she would have sailed before the 21st. The insurers were exonerated on the ground that the vessel was not "at sea" on the 21st, but was in a port of destination, although not in her final port. It was however admitted that if the vessel had put into St. Thomas through necessity, the underwriters would have been liable.

[1] Union Ins. Co. *v.* Tysen, 3 Hill, 118. The policy provided, in this case, that if the vessel was at sea on the day the risk expired, October 7th, it should continue until she reached her port of destination in the United States. On the 20th of September the vessel was at Rotterdam, in a canal, discharging her cargo. Finding no return freight to the United States, the captain determined to go to Newcastle-upon-Tyne, and thence home to New York. The ship was accordingly moved from the canal into the river Maese, about twenty-five miles from the sea, and was all ready for sea, but owing to contrary winds she did not sail until after the 7th of October. Held, that the moving from the canal was the commencement of the voyage, and that the vessel was protected till her arrival at her port of destination in the United States.

In Eyre *v.* Marine Ins. Co., 6 Whart. 247, a vessel was insured for twelve months, from November 10th, with liberty of the globe, and if at sea, etc., the risk to continue until her arrival at her port of destination in the United States. The vessel sailed from Philadelphia in November for South America for the purpose of freighting, took a cargo on board at Rio Janeiro in South America, and sailed for the island of Jersey in the British channel for orders. On the 10th of the following November she was at sea, and afterwards, having sustained heavy damage, she was compelled to put into Falmouth, England, for repairs. She then sailed for Altona, discharged her cargo, took another on freight, and in June sailed for New Orleans, where she arrived. The action was brought to recover for the damage done on the voyage to the island of Jersey. The court held that, if at the end of the year, the vessel was coming home, she was protected by the policy, but otherwise not, and excluded evidence that the voyage insured was known by the name of a trading voyage, and that by the usage of trade, the vessel might sail for any part of the globe, to which she could get a freight, at any time during the year, and continue covered by the policy during such voyage, although this usage was alleged to be well known to the underwriters, and acted upon by them, at the port to which the vessel belonged. But the court in 5 Watts & S. 116, being of opinion that this evidence ought to have been admitted, granted a new trial.

to "two ports" or more,[1] the insured may select any which come within the district. But the risk terminates when the vessel has been moored twenty-four hours in safety at the first port in the island at which she arrives, if the insurance be to "a port" in that island, or to the island.[2] If a vessel is insured on a fishing voyage, the risk does not terminate by her sending home part of her cargo which is damaged, and which, if suffered to remain on board, would injure the rest.[3] A policy on time for a certain period, terminates according to the time at the place where the contract is made, unless it is otherwise mentioned in the policy.[4] If a ship is insured until "she shall have ended and be discharged of her voyage," it seems that the risk continues till she is unladen.[5]

By the phrase usually contained both in the English policies and our own, the insurance continues on the vessel "until she shall be arrived and moored twenty-four hours in safety;" and on goods "until landed," or "safely landed." This means safety from the perils insured against, and not to those of a merely local character and incident to the port, as bad moorings, etc.; otherwise the policy might attach all the time she lay there.

[1] Vandervoort *v.* Smith, 2 Caines, 155. In Sea Ins. Co. of Scotland *v.* Gavin, 2 Dow & C. 125, insurance was effected at and from Leith to Shetland, and from thence to Barcelona, and at and from thence, and two other ports in Spain, to a port in Great Britain. The vessel discharged her cargo at Tarragona, and then proceeded to Saloe, where she was lost. It was objected that Saloe was not a port within the meaning of the policy, it being a mere roadstead protected by a headland, but the court held that as it was usually designated as a port, and was not more open than other places on the Mediterranean, and as it had a custom-house and harbor-master, and port duties were levied there, it was a port within the meaning of that term in the policy.

[2] Camden *v.* Cowley, 1 W. Bl. 417; Leigh *v.* Mather, 2 Esp. 412. This case is more fully reported in Park on Ins. 52, where it appears that the insurance was on the ship and goods "at and from Georgia to Jamaica." On the arrival of the ship in Montego Bay, most of the cargo was sold to merchants there, and the captain entered into a charter-party with them to proceed to St. Anne's, and there take in a cargo for London. Most of the cargo was unloaded at Montego Bay, and it was verbally agreed that the remainder should be carried as ballast to St. Anne's. It was held, that as Montego Bay was the original destination of the cargo, and that the delivery of the whole there was prevented only by a new agreement, the risk did not continue after the departure of the vessel. See also, Barras *v.* London Ass. Co., Park, Ins. 52.

[3] Phillips *v.* Champion, 6 Taunt. 3.

[4] Walker *v.* Protection Ins. Co., 29 Maine, 317.

[5] So held by the whole court on demurrer in Anonymous, Skinner, 243.

But she must be moored as safely as that harbor or port permits in the usual course of navigation. And if the vessel be ordered off, or into quarantine, before the twenty-four hours have passed, the policy does not cease to attach.[1] And if she anchors and moors safely, and her actual safety continues through a storm or peril which begins before or within the twenty-four hours, but does no harm until they have expired, she is considered as moored in safety during the twenty-four hours; because otherwise the risk might never terminate, for so long as the ship is in any port she must be in some degree of danger, or possibility of mischief.[2] By arrival is meant the reaching the usual place of unloading;[3] and by safety, not security from the hazard of every

[1] Waples *v.* Eames, 2 Strange, 1243.

[2] Bill *v.* Mason, 6 Mass. 313.

[3] In Samuel *v.* Royal Exch. Ass. Co., 8 B. & C. 119, a vessel was insured at and from Sierra Leone to London, until moored twenty-four hours in safety. The master, being ordered to take the vessel into the King's Dock at Deptford, moored the vessel near the docks, but was not able to enter on account of the ice. After lying in this place, where cargoes were sometimes discharged, several days, the vessel was totally lost. Held, that the place where she had lain, not being her place of ultimate destination, the underwriters were liable. In Angerstein *v.* Bell, Park, Ins. 45, the vessel arrived at the wharf where she was to be unladen, but there not being room on the inside, she was fastened on the outside of the tier of vessels, and after remaining in this position more than twenty-four hours was lost. Held that she had arrived. In Meigs *v.* Mutual Mar. Ins. Co., 2 Cush. 439, the insurance was on a vessel and her catchings on a whaling voyage, the risk to continue on and during her voyage and back to M., "until she be arrived and moored twenty-four hours in safety." On the return of the vessel to M., the water was not high enough to enable her to reach her wharf, which was her place of final destination. She was accordingly anchored in the harbor, and while being lightened and on her way to the wharf with proper diligence, was destroyed by fire. This did not happen until more than a week after her arrival in the harbor. The royal yards and masts, and top-gallant masts and yards were sent down, and all the sails unbent except the three topsails, spanker, and jib, which were left to work the ship to the wharf with. The court held that, under these circumstances, the insurers were liable, and said: "Reaching the harbor, therefore, cannot be arriving within the meaning of the policy; and if it do not mean that, it must mean that particular place or point in the harbor, which is the ultimate destination of the ship. Until that point is reached, the voyage is not ended, and the ship has not arrived; though she may be obstructed and delayed in her progress through the harbor, and for want of water, or by adverse winds, or other causes, be obliged to come to anchor, and remain at anchor twenty-four hours, and to take out some portion of her cargo. While she is properly pursuing her course to the place of her ultimate destination, and of complete and final unlading, and until she reaches that place, and has been moored there in safety twenty-four hours, she is insured and protected by the policy." This case is somewhat inconsistent with a case decided in England about the

loss insured against, for some of them, as fire, lightning, etc., remains always; but the being moored in fact during twenty-four hours, safe in the sense of uninjured.[1] But if the vessel arrives a mere wreck, she cannot be said to have been in safety a moment.[2] Nor if an embargo had been laid on all vessels previous to the arrival of the one insured, although she should not be arrested till the next day.[3] If a vessel is insured from a place to any

same time. Whitwell *v.* Harrison, 2 Exch. 127. The vessel was insured until moored at her discharging port in the United Kingdom, twenty-four hours, in safety. She was chartered to take a cargo of timber from Quebec to Wallasey Pool in the river Mersey, *or as near thereto as she could safely get*, and there discharge her cargo. The vessel arrived abreast of Wallasey Pool, on the 5th of the month, but was not able to enter it for want of sufficient water. Most of the crew were discharged, and the vessel was lightened. On the 14th of the month she fell over and was injured. All the cargo was not out at this time, and it was the captain's intention to take the vessel into Wallasey Pool, with as much of the cargo on board as he could carry with safety. The court held that the vessel had arrived and been moored twenty-four hours in safety. *Alderson*, B., said: "It appeared in evidence, that the captain always intended ultimately to carry the vessel into Wallasey Pool with as much of the cargo on board as she could carry over the shallow part intervening between his original anchorage and the pool. But it was also clearly established, that the discharge of the cargo was going on in due course, and that if the water were not sufficient, and no accident had occurred, the whole cargo would have been discharged in the place where the vessel was moored. Here the vessel was bound to Wallasey Pool, or as near thereto as she could safely get, and it is clear that that was the intended place for the discharge of her cargo." If this case can be distinguished at all from Meigs *v.* Mutual Mar. Ins. Co., it is on the ground that in the one the place of ultimate destination was the wharf, and in the other the Pool, or as near to it as the vessel could get.

The port of Havana consists of an outer and inner harbor. The outer is near the Moro Castle, and is used for the purposes of visit and search. It is an exposed and dangerous place, and it has accordingly been held that the risk on a vessel does not terminate until she has been moored twenty-four hours in safety in the inner harbor. Dickey *v.* United Ins. Co., 11 Johns. 358; Zacharie *v.* Orleans Ins. Co., 17 Mart. La. 637.

In Gray *v.* Gardner, 17 Mass. 188, a contract was made which was to be void in case a certain quantity of oil arrived at Nantucket and New Bedford on or before a certain day. It was held that the word *arrived* meant that the vessel in which the oil was to be brought, should drop anchor within the time, and the condition was not satisfied by the vessel merely being in the Nantucket Roads.

[1] Bill *v.* Mason, 6 Mass. 313. The vessel in this case arrived in a gale of wind, but was not injured by it, until after she had been moored twenty-four hours. It was held that the underwriters were not liable.

[2] Shawe *v.* Felton, 2 East, 109.

[3] Minett *v.* Anderson, Park, Ins. 45. So where a vessel's papers were taken, and her hatches sealed down immediately upon arrival, and orders given on the examina-

port or ports whatsoever, for a certain space of time, an open roadstead which is the usual place of loading and unloading is a port within the meaning of that phrase in the policy.[1] Goods are within the policy as not safely landed, so long as they are in boats or lighters, if this be the usual way of taking them from the ship to the port; and we should apply the same rule to any mode of conveyance by water, however unusual, which was made necessary, and therefore justifiable by the circumstances of the case.[2] If the consignee sends his own lighter for the goods, the risk has been held to terminate on the delivery of the goods on board the lighter.[3] The policy terminates when the goods are landed at the usual place of discharge, although the consignees may not be able to obtain possession of them at

tion of the papers to seize the ship and cargo, which was done, and condemnation of them followed, it was held that the vessel had never been moored in safety. Horneyer *v.* Lushington, 15 East, 46.

[1] Cockey *v.* Atkinson, 2 B. & Ald. 460.

[2] Matthie *v.* Potts, 3 B. & P. 23; Stewart *v.* Bell, 5 B. & Ald. 238; Wadsworth *v.* Pacific Ins. Co., 4 Wend. 33; Osacar *v.* Louisiana State Ins. Co., 17 Mart. La. 386. In this case the vessel, whose cargo was insured, arrived in the roadstead of Soto La Marina, in Mexico, and anchored outside of the bar in the usual place twenty leagues from the town, and commenced to discharge her cargo in lighters, according to the usage of the trade. After part had been landed, the vessel was driven away by a tempest and never heard from again. The court held that the plaintiff was entitled to recover for all the goods not brought to the town. But the court said that if the goods had been landed on the beach and transported to the town on the backs of mules, this would have been a land risk for which the underwriters would not have been liable.

[3] Sparrow *v.* Caruthers, 2 Strange, 1236. But see Langloie *v.* Brant, cited 2 B. & P. 434, note. If he merely hires a lighter and pays for it himself, the risk continues till the goods are landed. Rucker *v.* London Ass. Co., 2 B. & P. 432, note; Hurry *v.* Royal Exch. Ass. Co., 2 B. & P. 430, 3 Esp. 289. In Strong *v.* Natally, 4 B. & P. 16, the goods were taken out in a lighter hired in the usual manner, and the lighter brought to the wharf. Owing to the roughness of the weather, the goods could not be landed that night, and the lighterman asked the owner of the cargo whether he should stay and see the goods landed, to which the owner replied that he would look to the landing himself. In the night the lighter was sunk, and the court held that the underwriters were not liable, as the owner had taken the goods into his own care and possession. So, where the owner of goods, in consequence of the port of destination being blockaded, accepted them at an intermediate port, paying full freight, and thence transported them in lighters to their port of destination, it was held that he could not recover from the underwriter either the expenses of transshipping, and the freight paid for the lighters, or a premium of insurance paid for the risk in the lighters. Low *v.* Davy, 5 Binn. 595.

once.[1] There is some conflict of authority in regard to the point whether the risk continues till the whole cargo is delivered, or whether it is severable in its nature. On principle and on the preponderance of authority we are inclined to adopt the latter view.[2]

The risk terminates as soon as the voyage insured is abandoned or broken up by a peril not insured against.[3] If goods are insured on board a ship to a port, and from thence on board another ship to a final port, the risk continues while the goods are being removed in the usual manner from one ship to the other.[4] Where the vessel is wrecked and the cargo is sent

[1] Gracie *v.* Marine Ins. Co., 8 Cranch, 75. The insurance in this case was on the cargo of a vessel "at and from Baltimore to Leghorn," the risk to continue until the goods should be safely landed at Leghorn. By the laws of that place, ships and cargoes on arrival were obliged to perform a quarantine of thirty days before the cargo or any person on board could be admitted into the city. The cargo was taken from the ship in public lighters to the lazaretto by the officers of government, and until the expiration of the quarantine, the consignees could not remove the goods, and freight could not be collected. The court held, under these circumstances, that the underwriters were discharged when the goods were deposited in the lazaretto. See also, Brown *v.* Carstairs, 3 Camp. 161. In Mobile Mar. Dock & Mut. Ins. Co. *v.* McMillan, 27 Ala. 77, where goods were insured until safely landed at the port of New Orleans, the court held that the underwriters were discharged from liability after the cargo was discharged on the wharf, on the shore of Lake Ponchartrain. By the usage of trade, goods were sent forward from that place to the city of New Orleans by railroad, but the court held that land risks were not covered by the policy. And in Osacar *v.* Louisiana State Ins. Co., *supra*, p. 328, n. 2, the court said that if the goods were to be taken overland on mules to the port of delivery, the underwriters would not be liable, though the risk would continue if they were taken by water.

[2] The contract is considered as an entirety in Gardiner *v.* Smith, 1 Johns. Cas. 141, and in Fletcher *v.* St. Louis Mar. Ins. Co., 18 Mo. 193, and it is treated as severable in Gracie *v.* Maryland Ins. Co., 8 Cranch, 84; Osacar *v.* Louisiana State Ins. Co., 17 Mart. La. 386; and Mobile Mar. Dock & Mut. Ins. Co. *v.* McMillan, 27 Ala. 77.

In Ward *v.* Wood, 13 Mass. 539, the policy stated that the risk was to cease when the vessel should receive on board a cargo, with the intention of proceeding to the United States. This was held to mean a full cargo.

[3] See Brown *v.* Vigne, 12 East, 283, and cases cited ante, p. 247, n. 7.

[4] Tierney *v.* Etherington, cited 1 Burr. 348. In this case goods were insured in a Dutch ship from Malaga to Gibraltar, and at and from thence to England and Holland, both or either. It was agreed that on the arrival of the ship at Gibraltar the goods might be unloaded and reshipped in one or more British ship or ships for England and Holland. On arrival at Gibraltar, there being no British ship there, the goods were put into a store-ship which was considered as a warehouse, and while there were lost in a storm. The underwriter was held liable. See Oliverson *v.* Brightman, 8 Q. B. 781, and cases ante, p. 235, n. 2.

forward in another vessel to the port of destination, the underwriters are liable for a loss while the goods are in such substituted ship.[1]

SECTION IV.

OF A LOSS AFTER THE EXPIRATION OF THE RISK.

The voyage may have terminated and the policy have expired by limitation, either of time or of space; and even the risk may be said to be at an end; and after all this, a loss may occur for which the insurers are liable. But this can take place only when the cause of the loss was a peril insured against, which was encountered and became injurious to the property while it was covered by the policy; and the ultimate loss was not only the effect of the injury so sustained, but an effect so direct, immediate, and inevitable, that the injury must be deemed to be the proximate and only cause of the loss.

This question is often considered as if it asked only, whether,

[1] Plantamour *v.* Staples, 1 T. R. 611, note, 3 Doug. 1. The ship and cargo were in this case insured at and from Marseilles to Madeira, the Cape, and the isles of France and Bourbon, and to all parts and places in the East Indies and Persia, or elsewhere beyond the Cape of Good Hope, from port to port, and during her stay and trade to all ports and places, until her safe arrival back at her last port of discharge in France. The vessel sailed with a cargo consisting of bullion and merchandise consigned to the plaintiff's correspondents at Pondicherry, with directions to barter and sell the same on their account, and to make the returns in other goods, the produce of India. The vessel was lost at the Isle of France, but the cargo was sent on in another vessel by the master to Pondicherry. It was there received by the plaintiff's correspondents, and the proceeds invested in other goods, and forwarded to France in another vessel. This vessel was also condemned at the Isle of France, and the goods sent on in another vessel. This last was captured, and, with the cargo, condemned. Held that the policy continued to attach, notwithstanding the change of vessels, and that the underwriter was liable. And if in consequence of a disaster the ship cannot pursue her voyage to the port of destination in a direct manner, the underwriters on goods are liable notwithstanding the deviation. Winter *v.* Delaware Mut. Ins. Co., 30 Penn. State, 334. So if it is necessary on account of the loss of the ship to carry the cargo over land to transship it, the underwriters are liable while this is being done. Bryant *v.* Commonwealth Ins. Co., 13 Pick. 543, 555.

if a vessel, or other insured property, receives its death-blow during the policy and dies after the policy expires, the insurers are liable. But there is some danger of being misled by this figurative language, as was remarked in a recent case by Lord Campbell.[1]

The cases which present this question are not easily reconciled, and some of them are obscure; the latest, Knight *v.* Faith, being, as we think, the best. But we cannot doubt that the true principle is that which we have already indicated. We might express it by saying, that if insured property be injured by a peril insured against, the insurers are liable for the direct and immediate and inevitable consequences, wherever or whenever these may occur.[2]

[1] In Knight *v.* Faith, 15 Q. B. 649.

[2] One of the earliest cases on this subject, is Meretony *v.* Dunlope, cited 1 T. R. 260. The only original report that we have of it, is the citation of it by *Willes*, J., in Lockyer *v.* Offley, 1 T. R. 252, 260. He said: "It would be a dangerous doctrine to lay down, that the insurer should, in all cases, be liable to remote consequential damages. This has been compared to a death's wound received during the voyage, which subjected the ship to a subsequent loss. To this point, the case of Meretony *v.* Dunlope (E. 23 Geo. 3) seems very material. That was an insurance on a ship for six months, and, three days before the expiration of the time, she received her death's wound, but, by pumping, was kept afloat till three days after the time: there the verdict was given for the insurer, which was confirmed by the court. I will put another case; suppose an insurance on a man's life for a year, and some short time before the expiration of the term he receives a mortal wound, of which he dies after the year, the insurer would not be liable." This case has been followed in Ohio. Howell *v.* Protection Ins. Co., 7 Ohio, 284, where a steamboat met with an accident during the existence of the policy, in consequence of which she sunk the same day, but after the risk had expired. It was held, that as the damage done by the accident, excluding that occasioned by the sinking of the boat, did not amount to fifty per cent., the assured could not abandon.

In Furneaux *v.* Bradley, B. R. East, 20 G. 3, 2 Marsh. Ins. 584, the vessel was driven on the rocks and injured, but her condition could not be examined into till after the expiration of the policy. She was then found to be much damaged, but not irreparably so, but a difficulty having arisen on account of the want of materials, she was sold. Held, that the damage sustained by the running on the rocks should be estimated as an average, and not as a total loss. In Coit *v.* Smith, 3 Johns. Cas. 16, horses were insured against all risks, until safely landed. During a gale, one of the horses was thrown down and injured, and he died after he was landed. It was held, that the death of the horse was to be put out of the case, and that the underwriters were liable for the injuries which he had sustained, up to the time he was landed.

In Knight *v.* Faith, 15 Q. B. 649, the jury found a special case, to the effect that the vessel was insured on time, from Sept. 24, 1845, to Sept. 24, 1846. The vessel was stranded and brought into the harbor of Santa Cruz, on the 16th of Sept. 1846. She

Possibly, a distinction might be made in this respect between policies on time, and those on a voyage. Because, in the former, the liability of the insurer expires at a certain hour, wherever the ship may be; but in the latter, the policy expires when the ship has been moored twenty-four hours in safety; but she has never been moored in safety, if so injured that her destruction was inevitable.[1]

Upon the question of forfeiture and seizure, we have seen, that the cases, although in some conflict,[2] tend to the doctrine that the statute, together with the act or circumstance which forfeits the ship or cargo, has no effect in changing the property or upon the rights or liabilities of owners or insurers, until actual seizure.

remained there in safety till the middle of October, at which time, the cargo having been got out, it was found that the necessary repairs could not be made there, as there was no dock-yard, workmen, or materials at that place, and that she could not be taken to any other place to be repaired. She was accordingly sold by the master, who was also a part owner, for 77*l.* 10*s.* No abandonment was made. It was held to be a case where the insured could not recover for a total loss, without an abandonment, but the underwriter was held liable for a partial loss. Speaking of Meretony *v.* Dunlope, Lord *Campbell*, C. J., said: "We very much doubt, whether any such doctrine ever was laid down by Lord *Mansfield*, and the decision of the court may have proceeded on a totally different ground. The doctrine seems contrary to the principle of insurance law, that the insurer is liable for a loss actually sustained from a peril insured against during the continuance of the risk; and if a ship insured for time, during the time, receives damage from the perils of the sea, although the amount of it be not ascertained till the expiration of that time, and she is kept afloat till then, upon the assured's taking proper steps by giving notice of abandonment, or by obtaining evidence of the sum which would be required to repair the damage sustained, there does not appear any good reason why they may not, according to the facts, proceed against the insurers for a total loss or for a partial loss." We apprehend that Lord *Campbell*, by the words, "amount of it be not ascertained," means not only, when the amount of money needed for repair be not ascertained, but when the extent and character of the injury are not and cannot be ascertained until the direct consequences are fully developed.

It was also contended in this case, that as a total loss had taken place, for which the defendants were not liable, the partial loss must be considered as merged in the total loss, and consequently, that there was no liability at all, on the authority of Livie *v.* Janson, 12 East, 648, which case decided that where a partial loss occurred and there was afterwards a total loss by an excepted peril, the underwriters were not liable at all. But the court held, that there was no total loss in this case, as there was no such loss known in insurance law as a sale by the master; and that, if there had been a total loss, the defendants were not at liberty to say, that the partial loss was merged in the total loss.

[1] Shawe *v.* Felton, 2 East, 109. See also, Peters *v.* Phœnix Ins. Co., 3 S. & R. 25.

[2] See ante, p. 79, n. 4.

If this be law, and the circumstance which causes the loss by forfeiture, occurs while the policy attaches, but there is no seizure until after the policy expires, the insurers are not liable.[1] If the ship arrives at her port of destination in a disabled state, and is detained there for repairs a longer time than would have been the case had no damage been sustained, and while there, is seized in consequence of an embargo being laid, it has been held that the underwriters are not responsible for the loss by seizure.[2]

[1] Lockyer *v.* Offley, 1 T. R. 252; Mariatigui *v.* Louisiana State Ins. Co., 8 La. 65. See cases ante, p. 327, n. 3. The principal reason given by the court for their decision in Lockyer *v.* Offley, was that under the English statute a seizure might be made at any time within three years, and the rights and liabilities of the parties could not be determined till the expiration of that time, if they were liable at all after the voyage had ended. Whence, it was considered, that great inconvenience would arise. The court said: "There must be some certain and reasonable limitation, in point of time, laid down by the court when the insurer shall be released from his engagement. If he be liable for a month, he may be for a year, and so on. And we all think, that the law on insurances would be left unsettled, and in much confusion, if any other time were suggested than that prescribed by the policy, namely, the continuance of the voyage, and the ship's being moored twenty-four hours in safety."

[2] Roche *v.* Thompson, Millar; Ins. 205, Weskett, Ins. 196.

CHAPTER X.

OF TOTAL LOSS AND ABANDONMENT.

THESE topics are usually considered together, not because they are necessarily or always connected, but because, in practice, much the larger part of the losses which are total, become so by abandonment; or, at least, require an abandonment, that they may have the legal effect of a total loss.[1]

SECTION I.

OF ACTUAL AND CONSTRUCTIVE TOTAL LOSS.

The distinction between an *actual* total loss and a *constructive* total loss, defining the latter to be that which is made so by abandonment, is not perfectly precise. In a strict sense the property is not wholly destroyed, either by fire or submersion,

[1] Emerigon states that the present positive rules respecting abandonment, grew out of the express stipulations which it was the custom for the parties to make. Emerigon, ch. xvii. s. 1, Meredith's Ed. 666. However this may be, it is certain that provisions were very early made for abandonment in foreign codes regulating assurance. Guidon, de la Mer; Reg. d'Armsterdam, art. 25; Casaregis, Disc. 3, n. 6. Although it appears in the statute of 43d Elizabeth (1601), establishing a commission to decide questions arising among merchants, upon policies of insurance, that marine insurances had then been common, time out of mind, the subject of abandonment does not appear to have assumed importance in the courts until the time of Lord *Mansfield*. The first reported case on this subject appears to be that of Pringle *v.* Hartley, 3 Atk. 195, before Lord Chancellor *Hardwicke*. Molloy, in his short but lucid treatise upon insurance, scarcely alludes to the subject. Molloy, de Jure Maritimo, Book 2, ch. 7, s. xv. Weskett on Insurance, published A. D. 1783, contains only two cases upon it. At present there is perhaps no topic of insurance, more important or more difficult, or which has been illustrated by a larger number of more learned adjudications. See a very learned discussion of the subject of abandonment by Lord *Abinger*, C. B., in Roux *v.* Salvador, 3 Bing. N. C. 266.

and still less is it by capture. But it is wholly lost to the owner as the thing which it was formerly. The ship may be burnt to the water's edge, and the ruined hull still float; or it may have gone down where no human power can either find or recover it; or it may be captured, condemned, and sold, and so gone irretrievably. Under any such circumstances it is as totally lost to the owner as if it were annihilated, and there can be no reason why such losses should not be called total.

So where a vessel is abandoned by her officers and crew on the ocean, the question in every such case is, could the vessel have been brought into port, or, in other words, was the act of desertion justified, for if not there is no actual total loss under the policy; and the burden of proof would of course be on the owner to prove this fact. But if it be proved, the loss is not the less total because the master and crew might have remained on the wreck, or that it continued to float; if it be clear that it could not have been brought into port.[1] But if the burnt hull arrives at the port of destination, or the vessel sinks where, by a certain expense, she can be recovered, or is captured under such circumstances that a substantial hope exists of getting her again by ransom, decree of court, or otherwise, now the loss is neither total in a strict sense nor in any just sense; because, although the owner is dispossessed of his property in its original condition, there remains in his hands a valuable remnant, or a valuable hope and possibility of recovering the property. It is plain, therefore, that if he claims from his insurers as for a total loss, the principle of indemnity requires that he should in some way account or allow for the value remaining with him. Formerly, the way of doing this was, by calling the loss, not total, but partial, and claiming exact indemnity. But practice and long experience proved to merchants that the better way was to consider the loss total, and make it so in fact by transferring to the insurers all the remaining or resulting value in the hands of the insured. Then, the insurers paid the whole sum they were bound to pay in case of actual total loss, and indemnified themselves as far as possible from the value thus transferred to them.[2]

[1] Walker *v.* Protection Ins. Co., 29 Maine, 317.

[2] There seems to be a difference of opinion as to the expediency of extending the

This is now the usual practice. Such a loss is commonly called a constructive total loss, as distinguished from an absolute or actual total loss. And the latter term applies although some of the property has been sold and the proceeds are in the hands of the insured, if there is no need of an abandonment. The insurer is entitled to the property thus saved, and it is usually called salvage.[1] The phrase, "technical total loss," means much the same thing as constructive total loss.

right of abandonment. In Mitchell *v.* Edie, 1 T. R. 608, 615, *Buller*, J., said: "Whether many years ago it might not have been wiser for the courts to have determined that the owners should not in any case abandon where the property did exist, is not for our consideration. About the year 1745, that question was determined after much deliberation." Lord *Mansfield* in Goss *v.* Withers, 2 Burr. 683, 697, states that "in late times the privilege of abandoning has been restrained for fear of letting in frauds." And *Putnam*, J., in Deblois *v.* Ocean Ins. Co., 16 Pick. 303, says: "We are among those who think that this part of the law of insurance as it now is administered, is a clear departure from the great principle of indemnity upon which the contract of insurance should rest. According to the original intent surely, the underwriters were to pay the damage, the actual loss. They were not to become ship-owners, brokers, or merchants. We must decide the law as we now find it. But where a construction is to be made, in the absence of binding authority, we prefer that which restrains, rather than that which enlarges, the right to make a total loss." See also the remarks of Lord *Ellenborough*, C. J., in Bainbridge *v.* Neilson, 10 East, 329, 343. On the other hand Mr. Justice *Story*, in Peele *v.* Merchants' Ins. Co., 3 Mason, 27, 38, remarks: "It has been said that abandonments are not to be favored; that they have been liable to great abuses, and that courts of law are not disposed to enlarge the practice. I am very much inclined to believe, that of late years this consideration has had quite as much weight as it deserved." The Supreme Court of Massachusetts, moreover, in two recent cases, to be fully considered in a subsequent note, have carried the doctrine of abandonment very far. See Heebner *v.* Eagle Ins. Co., Sup. Jud. Ct., Mass., Nov. T. 1857; Kettell *v.* Alliance Ins. Co., S. C., Nov. T. 1857.

[1] These terms have not always been used with precision, but it seems now to be settled that those only are to be called *constructive total losses* which are consequent upon an abandonment. See Arnould on Ins. 990, 997. In Roux *v.* Salvador, 3 Bing. N. C. 266, the property saved was sold for nearly one fourth of the amount at which it was valued in the policy, yet Lord *Abinger*, C. B., in delivering the opinion of the Exchequer Chamber, said: "It appears to us that this was not the case of what has been called a *constructive* loss, but of an absolute total loss of the goods." So in Hugg *v.* Augusta Ins. & Banking Co., 7 How. 595, 605, *Nelson*, J., said: "In the case of memorandum articles, the exception of particular average excludes a constructive total loss; and, of course, the principle which allows an abandonment where the loss exceeds half the value does not apply. There must be an actual total loss." But it has never been denied that there might be salvage of memorandum articles, and yet a recovery for a total loss. See also Murray *v.* Hatch, 6 Mass. 465.

The insured may always withhold an abandonment if he chooses to do so; nor does this discharge or bar his claim against the insurers; it affects only the manner of the adjustment. If the loss be actually total, as there is nothing to abandon, an abandonment can have no effect whatever. If the loss be such that an abandonment is necessary to make it total, then the insured may claim and adjust it as a partial loss if he wishes to do so;[1] or he may abandon and claim for a total loss. As he never needs to abandon, unless he chooses to do it, so he may make an abandonment whenever he pleases; but if he makes one when the insurers are not bound to accept it, and they do not accept it, the abandonment has no effect whatever; but the insurers may accept any abandonment made to them, and if they choose to accept an abandonment which they are not bound to accept, by such acceptance they make it valid; and they must then settle the loss as a constructive or technical total loss.[2]

The questions which most frequently occur in relation to this matter, are whether the assured was under any necessity of abandoning, in order to make his loss total; whether he had any right to do so; whether he exercised this right (if he possessed it) in the proper time and way; whether the insurers have accepted the abandonment or not; and what is the effect of an abandonment, or of the want of one, upon the rights and obligations of all parties.

It should be remarked that the parties sometimes expressly agree and stipulate that there shall be no abandonment. This would seem to be intended to prevent a partial from becoming a constructive total loss, but not to change the nature of an

[1] Smith *v.* Manufacturers' Ins. Co., 7 Met. 448, 451; Hamilton *v.* Mendes, 2 Burr. 1198, 1211; Allwood *v.* Henckell, Park, Ins. 239; Gracie *v.* New York Ins. Co., 8 Johns. 237, 244; Earl *v.* Shaw, 1 Johns. Cas. 313, 317; Roget *v.* Thurston, 2 Johns. Cas. 248. In Watson *v.* Insurance Co. of N. A., 1 Binn. 47, it was held that where a total loss was proved to have taken place, but no abandonment made, the jury might estimate the value of the *spes recuperandi*, deduct it from the whole sum insured, and find the remainder as a partial loss. But *Kent*, C. J., in Gracie *v.* New York Ins. Co., *supra*, said he could not assent to this doctrine. See also, Calbreath *v.* Gracy, 1 Wash. C. C. 219.

[2] See post, § 6.

actual total loss.[1] So insurance may be made against total loss only, and the question then arises whether the assured may abandon and recover for a constructive total loss.[2] This ques-

[1] In Barney *v.* Maryland Ins. Co., 5 Harris & J. 139, the policy contained a stipulation, "not to abandon in case of capture until condemned." *Chase*, C. J., was inclined to consider the clause a warranty, and that an offer to abandon, after capture and before condemnation, avoided the policy. But *Buchanan*, J., held, that an abandonment, under those circumstances, had no effect whatever, and the assured was in the same position that he would have been, had no abandonment been made. This diversity of opinion did not affect the decision of the case, as the whole court were of opinion that there was no claim, either for a total or partial loss.

[2] In considering this question, which is one of considerable difficulty, it will be necessary first to mention one fact about which there is no controversy, namely, that the terms "total loss," "free from average," "free from particular average," "not liable for partial loss," and "partial loss excepted," mean one and the same thing, whether *that* be actual, or constructive, total loss.

One of the earliest cases where a ship was insured against total loss only, is that of Pole *v.* Fitzgerald, Willes, 641, decided in 1752, where it was assumed that a party who insured a ship free from average, might, by abandonment, recover for a constructive total loss. It was so assumed also in Cincinnati Ins. Co. *v.* Bakewell, 4 B. Mon. 541, decided in 1844. In neither of these cases was the question discussed. In 1810, the matter came before the Supreme Court of Massachusetts in the case of Murray *v.* Hatch, 6 Mass. 465. The ship, cargo, and freight were insured against "a total loss only." The vessel was valued at four thousand dollars. During the voyage she was driven ashore on the island of Bermudas, and so damaged that it would have cost fifteen hundred dollars to repair her. She was sold to pay salvage expenses, and after this was done, a balance of about four hundred dollars remained. At the trial, parol evidence was offered that at the time of subscribing the policy, it was agreed that the policy should be considered as against a total loss in the natural sense of the words only, so that if any part should be saved, the underwriters should not be considered liable. This evidence was rejected, and the defendant then contended that the words used did not include a constructive total loss, but the judge ruled that the loss as proved was a loss within the policy. The case then came up on exceptions to these rulings, and was argued before *Sewall*, J., *Sedgwick*, J., and *Thatcher*, J. On page 477, *Sewall*, J., said: "It is stated that the vessel was not worth repairing, and that it would have cost fifteen hundred dollars to repair her, which proves that the subject-matter of the insurance was not specifically destroyed, and that the voyage was not entirely and inevitably defeated. Whether the injury sustained, and the expenses of salvage, rendered the voyage of no value, and not worth pursuing, is not a question to be considered, where the policy is restricted to the case of a total loss. That case is only proved by showing the destruction of the thing specifically, and in that sense totally." The learned judge also in another part of the decision refers to the authorities on the common memorandum clause, which he considers as determining the construction of the phrase "total loss only." The verdict was set aside and a new trial granted. It may be said that in this case there was no constructive total loss, but the case was not argued on this supposition, and was decided solely on the ground that a total loss, in this connection, meant an actual, and not a constructive total loss. The

tion has been the subject of much litigation of late, and what we have considered to be the well-established rule in this country,

fact that the vessel might have been repaired at an expense less than half her value, is referred to only to show that the vessel "was not specifically destroyed or rendered irreparable." In a similar case in New York, Buchanan *v.* Ocean Ins. Co., 6 Cow. 318, 331, the same construction was given to these words, and *Savage*, C. J., after citing the above case of Murray *v.* Hatch, said: "Whether there was in this case, a technical total loss; whether an abandonment was necessary; or if so, whether it was made in due season, are questions not necessary to be discussed, upon the view which I have taken."

In November, 1855, this question came again before the Supreme Court of Massachusetts in the case of Heebner *v.* Eagle Ins. Co., briefly reported 20 Law Reporter, 578. Insurance was effected on the steam propeller Chesapeake for one year, against total loss only. The vessel was valued at forty thousand dollars. During the period of the risk she was damaged by perils of the sea, and put into port, where she was surveyed, and the repairs, necessary to render her sea-worthy, estimated at $22,951. In compliance with the report of the surveyors, the vessel was sold at auction, and brought $2,175. The case came before the court on an agreed statement of facts, by which, if the court should be of opinion that the defendant was liable for a constructive total loss, the case was to be sent to an assessor to determine whether such a loss had actually taken place. In November, 1857, the court held that the phrase total loss meant a constructive total loss, and that the defendant was liable if such a loss had taken place.

Some policies, it may be remarked, contain a clause that the insurers shall not be liable for any partial loss under fifty per cent. Commonwealth Ins. Co. *v.* Chase, 20 Pick. 142.

As the loss of freight generally depends on the question whether there has been a loss of the cargo, we shall consider the two subjects together.

In one of the earliest cases on this topic, Cocking *v.* Fraser, Park, Ins. 151, Lord *Mansfield* defines a total loss to be the "absolute destruction" of the subject, thus clearly excluding a constructive total loss. Lord *Ellenborough*, in Thompson *v.* Royal Exch. Ass. Co., 16 East, 214, said: "If this can be converted into a total loss by a notice of abandonment, the clause excepting underwriters from particular average may as well be struck out of the policy." In Skinner *v.* Western Mar. & F. Ins. Co., 19 La. 273, *Bullard*, J., said: "The doctrine in relation to memorandum articles is well settled at the present day; as it relates to them there is no constructive total loss." — "The cargo in question, corn, being within the memorandum, which exempts the insurer unless the loss is total, that is unless specifically destroyed or lost, the only question here is, whether under these circumstances, the corn is to be regarded as falling within the rule." Per *Nelson*, J., Bryan *v.* New York Ins. Co., 25 Wend. 617. "The terms used in the policy, 'free from average unless general,' are understood to be convertible with total loss; and under such a warranty by the assured the law is perfectly well settled in the United States, that there must be either a total physical destruction of the object insured, or a total destruction of value." Per *Porter*, J., Aranzamendi *v.* Louisiana Ins. Co., 2 La. 432. The following cases also fully support the doctrine that the words total loss, when applied to cargo or freight, mean actual and not constructive total loss. Hugg *v.* Augusta Ins. Co., 7 How. 595; Morean *v.* United States Ins. Co., 1 Wheat. 219; Biays *v.* Chesapeake Ins. Co., 7 Cranch, 415;

namely, that the words "total loss" meant actual and not constructive total loss, and consequently that there could be no

Saltus *v.* Ocean Ins. Co., 14 Johns. 138, 145; Humphreys *v.* Union Ins. Co., 3 Mason, 429; Brooke *v.* Louisiana State Ins. Co., 16 Mart. La. 646; Depeyster *v.* Sun Mut. Ins. Co., 17 Barb. 306; Wadsworth *v.* Pacific Ins. Co., 4 Wend. 33, 38; Williams *v.* Kennebec Mut. Ins. Co., 31 Maine, 455, 461; Le Roy *v.* Gouverneur, 1 Johns. Cas. 226; Ogden *v.* General Mut. Ins. Co., 2 Duer, 204; Willard *v.* Millers & Manuf. Ins. Co., 24 Mo. 561; Navone *v.* Haddon, 9 C. B. 30; Robinson *v.* Commonwealth Ins. Co., 3 Sumner, 220.

We will now proceed to consider the authorities which are opposed to the view above taken, and which maintain that the assured may recover for a constructive total loss. The leading case on this point is the late one of Kettell *v.* Alliance Ins. Co., Sup. Jud. Ct., Mass., Nov. T. 1857. The policy was an open one with the following indorsement: "Feb. 1, 1854. $4,850 on property on board ship Charles Humberston from Liverpool to Boston." The policy contained the usual memorandum clause, together with the following article in the margin, near the close of the policy, "Partial loss on sheet-iron, iron wire, braziers' rods, iron hoops, and tin plates is excepted." It appeared by the facts agreed that the "property" embraced in the indorsement consisted of five hundred boxes of tin plates, invoiced and valued together. The ship sailed, and was wrecked on the coast of Ireland, and the cargo in a damaged condition was carried back to England, and sold for account of whom it might concern. The net proceeds of the tin plates, after deducting the necessary costs and expenses of sending them back to Liverpool, and the costs of the sale, were less than half the value of the shipment. Held that the insurers were liable. This decision proceeds on the ground that there is a distinction between the meaning of the words "partial loss excepted," when applied to articles perishable in their nature, and tin plates. Thus, *Shaw*, C. J., said: "One reason given why a constructive total loss should not be made up of damage on memorandum articles, so as to allow of an abandonment for damage, was that in case of mere damage, it is so difficult to distinguish between that part of the visible damage which proceeds from internal tendency to decay, and that part from perils of the sea, that it must have been the intention of the contracting parties to exclude it altogether. In this respect there is a marked difference between tin and brass goods liable to tarnish and memorandum articles liable to decay." The effect of this decision, then, as we understand it, is this, that the meaning of the words "against total loss only," depends entirely upon the nature of the article insured, that when applied to articles perishable in their nature, they mean actual total loss, and when applied to other articles, constructive total loss. The case of Heebner *v.* Eagle Ins. Co., may be considered as leading to the same conclusion. But the insurers on an old ship are unwilling to sustain the risks arising from her weakness and decay, because such injuries mingle themselves so inextricably with, and so much increase, those which arise from sea-perils, that the insurers prefer not to insure against any but sea-perils, and for this purpose insert the exception, which excludes all but total loss. This is generally, at least, the reason for this exception in relation to a ship, and it is the same reason which has induced the same exception as to memorandum articles; nor is it satisfied in either case, unless the total loss insured against is held to be actual total loss only. It is a serious objection to the construction put upon these words by the learned court of Massachusetts, that the right of the assured, under the construction given to these words, does not depend

abandonment under the fifty per cent. rule, has been departed from in Massachusetts, and it is there held that if the subject

upon the quantum of injury done, but upon the election of the assured to abandon. For he cannot, although the damage amount to ninety-nine per cent., recover any thing, if a valid abandonment is not made. His right to recover, then, depends upon his own act, and not on the occurrence of any peril insured against. In other words, the abandonment operates as if it were the proximate cause of the loss. This objection is one of the principal causes of the construction put upon the words, "partial loss excepted," in the common memorandum. Mr. Justice *Washington*, in Morean *v.* United States Ins. Co., 1 Wheat. 219, states the law as follows: "There is no instance where the insured can demand as for a total loss, that he might not have declined an abandonment, and demanded a partial loss. But if the property insured be included within the memorandum, he cannot, under any circumstances, call upon the insurers for a partial loss, and consequently he cannot elect to turn it into a total loss."

The object of the memorandum clause originally, was undoubtedly to protect the underwriter from any partial loss on articles perishable in their nature, which are liable to inherent decay and damage, independently of the damage occasioned by the perils insured against, and where it would be difficult to distinguish between them. See Hugg *v.* Augusta Ins. & Banking Co., 7 How. 595. But if the reason of the origin of the memorandum clause should be resorted to, to determine the liability of the underwriters under it, it would follow that where a portion of the article insured was clearly proved to have perished by a peril of the sea, the underwriters would be liable for such loss, the memorandum being treated as of no effect. Such is the natural consequence of the reasoning in the above cases of Heebner *v.* Eagle Ins. Co., and Kettell *v.* Alliance Ins. Co., but courts of high authority have declared that the parties are bound by their contract, that the words "total loss" have acquired a fixed and determinate meaning, and that the origin of the clause cannot be looked at to determine the liability of the insurers. Thus, in Biays *v.* Chesapeake Ins. Co., 7 Cranch, 415, where a part of a cargo of hides was lost by a lighter sinking, it was contended that the rule did not apply. Mr. Justice *Livingston* said: "Whatever may have been the motive to the introduction of this clause into policies of insurance, which was done as early as the year 1749, and most probably with the intention of protecting insurers against losses arising solely from a deterioration of the article, by its own perishable quality, or whatever ambiguity may once have existed from the term average being used in different senses, that is, as signifying a contribution to a general loss, and also a particular or partial injury, falling on the subject insured, it is well understood at the present day, with respect to such articles, that underwriters are free from all partial losses of every kind which do not arise from a contribution towards a general average." In a similar case in New York, the language of the court is even stronger. Wadsworth *v.* Pacific Ins. Co., 4 Wend. 33, 38, per *Walworth*, Ch.: "The object of introducing the memorandum into the policy was to protect the underwriters against injuries arising to particular articles from inherent decay. But it does not follow that the excepted risk is to be confined to those injuries only. If the insurer, for the purpose of guarding against natural decay, has made the exception broad enough to include other losses, he is entitled to exemption from every risk which is plainly and explicitly included within the terms of the exception. If the terms free from average unless general, as used in the memorandum, had by a long course of commercial usage acquired a precise and definite meaning among commercial men, it would be the

insured is not perishable in its nature, the assured may abandon if the damage exceeds fifty per cent. of the valuation. We are

duty of the court to consider them as used in that sense in a recent policy. But there is no evidence that the term average, as here used, has ever been understood as meaning a partial loss arising from deterioration in the quality or value of the articles exclusively. I believe in the United States the terms partial loss and average are understood by commercial men to mean the same thing; and that average other than general includes every loss for which the underwriter is liable, except general average and total loss, which last includes total loss with salvage. In relation to the law of insurance, it is not only important that it should be fixed and certain, but it is equally desirable that the principles adopted should be the same in all the courts of this country; and where the law has been deliberately settled in the Supreme Court of the United States, or in the Superior Court of any particular State, the rule thus adopted should not be departed from by any other court on slight grounds."

So, in Brooke *v.* Louisiana State Ins. Co., 16 Mart. La. 640, 644, where mules were insured against stranding or a total loss, the court held that although mules were not generally considered memorandum articles, still the parties had a right to enumerate them in that clause; and this being done the words total loss were to receive the same construction as would be applicable to memorandum articles generally. And in Waln *v.* Thompson, 9 S. & R. 115, where insurance was effected on "profits" on a cargo of goods warranted free from average, the court held that a loss of over fifty per cent. was not a total loss, although the goods were china, tea, and cassia, articles not perishable in their nature. The distinction between perishable articles and others was strenuously urged by counsel, but the court held that the same rule applied to both.

There is also one other objection to the decision of the court, in the above case of Kettell *v.* Alliance Ins. Co. The court assumed the fact, that tin plates are not to be classed with articles perishable in their own nature. Although tin plates are not articles perishable in their nature, if by that is meant easily liable to entire destruction, yet their value is very perishable; and from their liability to rust, they are generally considered by underwriters, as more dangerous articles to insure, than many articles called perishable, and are insured at a higher premium. In New York, bar and sheet iron, iron wire, *tin plates*, salt, grain of all kinds, tobacco, Indian meal, fruits (preserved or otherwise), cheese, dry fish, vegetables and roots, hempen yarn, cotton bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses, and all other articles perishable in their nature are classed together, and insured free from average unless general, while sugar is insured free from average under seven per cent. Vaucher, Guide to Mar. Ins. 131. In New Orleans, the classification is much the same, while sugar is insured free from average under five per cent. Vaucher, Guide to Mar. Ins. 126. In the elaborate enumeration of memorandum articles, by Mr. Phillips, 1 Phillips, Ins. § 54, note, it appears that tin plates are insured free from average in New York, Philadelphia, Baltimore, and Charleston. By the Charleston Comm. Ins. Co., they are insured free from average, if damaged by wet or rust. In Cincinnati, they are free under twenty per cent.

The usual memorandum clause in the policy now under consideration, exempted the underwriters from all partial loss on salt, grain, fish, fruit, hides, skins, or other goods perishable in their nature, unless the loss should happen by stranding, in which case, they were not to be liable for loss under seven per cent. On sugar, flax-seed, bread,

however of opinion, that the rule which rests on the weight of authority, and on the stronger reason, would not sanction an action under a policy restricted to a total loss, by any of the many phrases which are used for that purpose, unless the loss be total without abandonment.

In this country, the ship, cargo, and freight are seldom jointly insured in the same policy. If they are, it would seem that an abandonment cannot be made of either of these interests separately.[1] If one sum is insured by the policy upon a cargo consisting of various kinds of merchandise, it would seem to be clear that there can be no abandonment of a part, and not of the whole. If insurance is made, therefore, against the total loss by actual destruction of the whole only and some portion of one of the kinds of merchandise on board is saved, there is no valid claim whatever against the insurers.[2] But if the several parts

tobacco, and rice, they were to be liable for all loss over seven per cent. of the aggregate value. Then, near the end of the policy, was the clause, "partial loss on sheet-iron, iron wire, braziers' rods, iron hoops, and tin plates, is excepted." From the fact, that the words "unless the vessel be stranded," were omitted, we think it clear that the underwriters regarded these articles as the most liable to damage, of all enumerated in the policy. But the court deduced a different result from the same facts. After mentioning that the underwriters would have been liable if the goods had been in the common memorandum, as the loss happened by stranding, *Shaw*, C. J., said: "What, then, is the extent of this exception? The natural construction is, that it leaves the insurer liable for all total losses, but it makes no distinction between absolute and constructive total losses, and in case of a constructive total loss, which gives the assured a right to abandon, and he exercises the right, it becomes a legal total loss, as if absolute in its nature." We are, however, constrained to say that this does not, in our judgment, seem to be the most natural construction, and accordingly, after a careful review of the authorities, we consider the law to be, that the effect of the words, "partial loss excepted," or "against total loss only," is to exempt the underwriter from all loss but an actual total loss. But in Massachusetts, the tendency of the late decisions seems to establish the rule, that the assured may abandon if the article be not perishable in its nature; although the court once declared itself in favor of restraining the right of abandonment to those cases where it was compelled to recognize it by settled law. Deblois *v.* Ocean Ins. Co., 16 Pick. 303.

[1] In Stocker *v.* Harris, 3 Mass. 409, the position was taken by counsel, that in such a case, the interest in the ship could not be alone abandoned, but the point was not decided by the court. See 2 Marsh. Ins. 601.

[2] Guerlain *v.* Col. Ins. Co., 7 Johns. 527. See also, Humphreys *v.* Union Ins. Co., 3 Mason, 429; Morean *v.* United States Ins. Co., 1 Wheat. 219; Waln *v.* Thompson, 9 S. & R. 115. But in England, it has been held in a recent case, that where insurance was effected on goods described as "master's effects," those lost might be recov-

or kinds of merchandise are severally and distinctly valued, it has been held, that this divides the loss so entirely, that there may be an abandonment of one of these parts, and not of the rest.[1]

A similar question arises, when a cargo consisting of bales, packages, etc., of the same kind of goods, is insured against total loss only, or free from average, under a certain per cent. But this subject we have already considered, and refer to what we then said.[2]

It is obvious, from the nature and purpose of abandonment, that no person can abandon, who has not the power of making a legal transfer of the interest or property which he abandons. If, therefore, the property passes from him by his own voluntary act or by a peril not insured against, before the underwriters can take possession of the vessel, the loss is to be considered as partial only.[3] But if the sale of the vessel is rendered necessary by

ered, although not separately valued. Duff *v.* Mackenzie, 30 Law Times, 103, 20 Law Reporter, 701.

[1] Deidericks *v.* Commercial Ins. Co., 10 Johns. 234. So, if different parts of a cargo, belonging to one person, are insured by the same underwriters by different policies, it seems, that an abandonment may be made upon one policy. Valin, tome 2, p. 109. And if a certain sum is insured on each article, this is the same as if it was separately valued. Emerigon, c. 17, s. 8; Pothier, Ins. n. 132.

[2] See ante, p. 273, 274.

[3] In Higginson *v.* Dall, 13 Mass. 96, the ship was insured by a valued policy to the full amount of her valuation in Calcutta, and also by an anterior open policy by the defendant. The vessel had been abandoned to the underwriters on the Calcutta policy, who accepted the same and paid as for a total loss. There was evidence tending to show, that the vessel was worth more than the valuation in that policy, but the court held, that the plaintiff could not recover as for a total loss, from the defendant, as he had voluntarily parted with all title to his ship. So, in Rice *v.* Homer, 12 Mass. 230, where loss by capture was exempted, and the vessel was damaged by perils of the sea, to an amount exceeding half her value, but no abandonment was made, and she was afterwards captured, the court held, that as the assured could not deliver up the vessel, he could not recover as for a total loss. And if, after an insurance is made, the property is mortgaged, no abandonment can be made, if the mortgage subsists at the time of the loss. Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. 249. See also, Smith *v.* Columbia Ins. Co., 17 Penn. State, 253. In Williams *v.* Smith, 2 Caines, 13, the vessel, at the time the assured purchased her, was under a bottomry bond of an amount greater than her value, but of this fact the assured was ignorant. During the voyage, the vessel was abandoned for want of funds to carry on the voyage, but was sold under the bond before the underwriter obtained possession of her. Held, that the underwriter was liable only for the balance which remained after the sum for which the vessel was

a peril insured against, the insured may still abandon and claim a total loss, if the sale was caused in no way by his default.[1] And if after an abandonment, but before the underwriters can take possession, the master sells the vessel, this act will be considered as done by him as agent of the underwriters; and if the facts, at the time of the abandonment, showed the loss to be total, the sale will not in any way affect the rights of the assured.[2]

It has been held, that if there be an abandonment, and the insurers require an instrument of cession and transfer of the salvage, and the insured refuse to give it, he may still claim as for a total loss, because the abandonment did all that an instrument of cession could do.[3] If, however, the insurers had reason for their request, because without such further instrument and the authority it gave, they could not recover the salvage, doubtless such cession would be held to be an essential part of the abandonment, and the latter would therefore be incomplete without it.[4]

sold, was deducted from the valuation. And if a bottomry bond is given during the voyage, which has not been paid, although the owners had an opportunity of paying it, it would seem, that the assured could not abandon. Allen *v.* Commercial Ins. Co., 1 Gray, 154. See also, Badger *v.* Ocean Ins. Co., 23 Pick. 347, 356.

[1] See, for sale to pay salvage, post, p. 370, n. 2; for sale under bottomry bond, post, p. 360, n. 1; and for sale by master, post, p. 365, n. 2.

[2] Center *v.* American Ins. Co., 7 Cow. 564; Ruckman *v.* Merchants' Louisville Ins. Co., 5 Duer, 342, 369; Bryant *v.* Commonwealth Ins. Co., 6 Pick. 131.

[3] Hurtin *v.* Phœnix Ins. Co., 1 Wash. C. C. 400.

[4] Hurtin *v.* Phœnix Ins. Co., 1 Wash. C. C. 400, 405, per *Washington*, J. In Chesapeake Ins. Co. *v.* Stark, 6 Cranch, 268, a deed of cession was given, but it was objected to, on the ground of its being informal. *Marshall*, C. J., said: "The informality of the deed of cession is thought unimportant, because, if the abandonment was unexceptionable, the property vested immediately in the underwriters, and the deed was not essential to the right of either party. Had it been demanded and refused, that circumstance might have altered the law of the case."

SECTION II.

OF ABANDONMENT OF THE SHIP.

If the insurance be on a ship, and it is wrecked, and becomes "a mere congeries of planks," it is still usual to abandon, although it is said not to be necessary to do so.[1] So, if a ship be not heard from for a sufficiently long time, the presumption of an actual total loss will arise, and there may be a claim as for a total loss, without abandonment.[2] But here too, the insurers, by payment of a total loss, would be entitled to her, or any part of her, which should afterwards be recovered.[3]

The property insured may have passed from the persons insured, by a sale which was justifiable, because rendered necessary by a peril insured against. Then there need, perhaps, be no abandonment, but the claim may be for a total loss. The cases on this question are numerous and irreconcilable, as our note[4] will show. But we think the better rule to be, that if the

[1] Cambridge *v.* Anderton, 2 B. & C. 691, per *Abbott*, C. J.

[2] Gordon *v.* Bowne, 2 Johns. 150. This point was raised but not decided, in Camberling *v.* M'Call, 2 Yeates, 281, 2 Dall. 280. See also, cases cited ante, p. 223, n. 1, in many of which, it seems to have been assumed, that no abandonment was necessary in such a case.

[3] Houstman *v.* Thornton, Holt, N. P. 242, per *Gibbs*, C. J.

[4] It is obvious, that if the circumstances are such that a total loss can be recovered without an abandonment, such a sale of the salvage would not affect the rights of the assured. The proceeds, if retained by the assured, must be deducted from the amount of the total loss. See the following note. The precise question, then, is, whether a sale will, in any case, take the place of an abandonment, or under any circumstances, give a claim for a total loss, when there would not have been one without the sale.

In England, the question came up in Allwood *v.* Henckell, Park, Ins. 239; Martin *v.* Crokatt, 14 East, 465; Bell *v.* Nixon, Holt, N. P. 423; Cambridge *v.* Anderton, 2 B. & C. 691, Ryan & M. 60, 4 D. & R. 203, 1 C. & P. 213; Doyle *v.* Dallas, 1 Moody & R. 48; Gardner *v.* Salvador, 1 Moody & R. 116; Roux *v.* Salvador, 1 Bing. N. C. 526, 3 Bing. N. C. 266.

In Allwood *v.* Henckell [1795], the vessel was captured and recaptured, and sold under a decree of the Vice-Admiralty Court of Antigua, to pay one eighth salvage. There was no abandonment, but a total loss was claimed. Lord *Kenyon* was in doubt, but was inclined to think, "that an abandonment was necessary, *and that the case was*

sale be justified by a sufficient necessity, and is free from objection as to the manner of it, it passes the property completely

the same, as if the property had remained in specie at Antigua, and had not been sold." The verdict was for an average loss. See Hodgson *v.* Blackiston, Park, Ins. 240, note. In most of the cases which followed this, the effect of a sale was not much considered, but the courts appeared to assume that it did not affect the nature of the claim. In Martin *v.* Crokatt [1811], there had been a sale, but Lord *Ellenborough* said: "When the thing exists in specie, as it did here, I cannot say, but that an abandonment is necessary." In Gardner *v.* Salvador [1831], *Bayley*, J., said: "The question in this case is, whether you are satisfied that there has been a total loss by perils of the sea. *I know of no such head of insurance law, as loss by sale.*" In Cambridge *v.* Anderton [1824], the vessel "got upon rocks in the river St. Lawrence, in foggy and tempestuous weather. She was there much injured, and surveyed by experienced persons, who gave it as their opinion, that the expense of getting her off the place where she was lying (if that could be accomplished), and repairing her, would far exceed the value of her when repaired; under these circumstances, the captain and the agents for the plaintiff, sold the ship, with her certificate of registry. The purchaser did succeed in getting her off the rock, took her back to Quebec, and repaired her." 2 B. & C. 691. The assured recovered a total loss, although there was no notice of abandonment. The decision was questioned by *Tindal*, C. J., in Roux *v.* Salvador, 1 Bing. N. C. 488, and the broad rule laid down, "that whenever the assured claims for a total loss, there being any thing saved, he must first relinquish to the underwriter all his interest in what remains." But the case of Roux *v.* Salvador was carried to the Exchequer Chamber, and the decision of the court below was overruled, and Cambridge *v.* Anderton was sustained. Lord *Abinger*, C. B., referring to that case, said, "it is an express decision, that when the subject-matter insured has, by a peril of the sea, lost its form and species, where a ship, for example, has become a wreck or a mere congeries of planks, and has been *bonâ fide* sold in that state, for a sum of money, the assured may recover a total loss without any abandonment." This is the extent to which the English decisions have gone in determining the effect of the *sale of a ship*.

It does not appear, that if a ship were sold, on the ground that the expense of repairs would exceed her value when repaired, and on that ground alone, a total loss could be recovered without an abandonment. See Fleming *v.* Smith, 1 H. L. Cas. 513.

Substantially the same principle seems to have been adopted, where the *cargo* has been necessarily sold at an intermediate port.

In Roux *v.* Salvador, 3 Bing. N. C. 266, the cargo of hides, on a voyage from Valparaiso to Bourdeaux, were necessarily unloaded at Rio Janeiro, where the vessel was obliged to put in for repairs. They were found to be in such a state of progressive putrefaction, that, if it had been attempted to carry them to Bourdeaux, they would have lost their character of hides before their arrival. They were sold as hides, and brought the sum of 273*l.*, the valuation in the policy being 1,117*l.* No notice of abandonment was given. In the Court of Common Pleas, it was held that it was not a total loss, on the ground above stated. But in the Exchequer Chamber, the decision of the Court of Common Pleas was overruled, and it was held to be an actual total loss. In that case, no expense would have caused the hides to arrive in specie, "they never could have arrived in the form of hides." A distinction was taken between the case in which "it is wholly out of the power of the assured, or of the underwriter," to

from the insured. He has lost the whole, and may recover for the whole without abandonment. But if the assured abandons,

procure the arrival of the thing insured, and the case in which goods "are not worth the expense of bringing them to their destination," and it was said, that an abandonment was necessary in the latter case, and the court did not go so far as to hold, that a sale in such a case would dispense with notice of abandonment, and no English case appears to have carried the doctrine so far since. See Rosetto *v.* Gurney, 11 C. B. 176, 7 Eng. L. & Eq. 461, a case in which notice of abandonment was given.

In the late case of Fleming *v.* Smith, 1 H. L. Cas. 535, the vessel was repaired at an expense exceeding her value when repaired, it was held, that the insured were not entitled to recover as for a total loss, as no abandonment had been made in due season. Lord *Campbell* said: "According to all the old authorities, a constructive total loss can only entitle the owners to recover as for an actual total loss, by a notice of abandonment, for though, in the judgment of the assured, it may be better not to repair the vessel, the underwriters may, with different means, give directions to repair, or may direct, and are entitled to direct, how the wreck is to be disposed of. It would be an extreme hardship for them to be called on to pay as for a total loss, without having the opportunity of making the most of the ship in its disabled state. The law, therefore, requires that notice shall be given, in order to convert a constructive into an absolute total loss. Then we come to the cases of Cambridge *v.* Anderton, and Roux *v.* Salvador. The Court of King's Bench held, in Cambridge *v.* Anderton, without overturning the old authorities, that in the peculiar circumstances of that case, a notice of abandonment was not necessary. But why? Because, coming down the St. Lawrence, the ship met with a serious misfortune, and the captain, after having taken the best advice, thinking it not worth repairing, sold it at once and conveyed a good title to the purchaser. The owners received intelligence of that sale at the same moment that they learned the injury which had happened to the vessel. In such circumstances, there was nothing to abandon. The ship was gone; the underwriters could not have taken possession of it, for it was lawfully transferred to the purchasers. Then comes the case of Roux *v.* Salvador, in which Lord Chief Justice *Tindal* held, that notice of abandonment was not necessary. There the hides were so injured that they ceased to exist as hides before reaching the port of destination; so that, though the substance of something remained, the substance of what had been insured was destroyed. But here the ship existed, was repaired, and brought home a cargo to England." But the answer to all Lord *Campbell's* reasoning is, that he is supposing a case where the sale is *not* justified by an adequate necessity. For if the owners or insurers could have directed her disposition, they should have had an opportunity.

In Knight *v.* Faith, 15 Q. B. 649, the vessel was injured and carried into port, and it was there found that the necessary repairs could not be made there, as there was no dockyard, men, or materials, and that the vessel could not have been taken to any other port where repairs could have been made. She was accordingly sold by the master for 72*l.* 10*s.* No abandonment was made, and it was held, that the assured could not therefore recover a total loss. Lord *Campbell*, C. J., said: "For there is no such loss known in insurance law, as a sale by the master, unless it be barratrous; and a *bonâ fide* sale by the master can only affect the insurers, when it becomes necessary by prior damage, arising from a peril for which they were answerable."

In Irving *v.* Manning, 1 H. L. Cas. 287, 6 C. B. 391, where the expense of repairs would have exceeded the value of the vessel when repaired, an abandonment was

the salvage or proceeds, belong at once to the insurers, and are afterwards at their risk; if he does not, they are at his risk,

made, and the insured recovered. So, in Young *v.* Turing, 2 Man. & G. 593. And the insured may not be entitled to recover in all cases, even if he abandons, as where the damage of itself does not amount to a total loss, but the ship, on account of old age, is not worth repairing. Cazalet *v.* St. Barbe, 1 T. R. 187.

These English cases appear to leave it somewhat uncertain, what is the precise effect of a sale when justified by necessity, upon the rights of the assured. A still greater uncertainty exists in the American law upon this point.

The doctrine, that there need be no abandonment, in case of a sale by necessity, is supported by several cases. Fuller *v.* Kennebec Ins. Co., 31 Maine, 325; Prince *v.* Ocean Ins. Co., 40 Maine, 481; Mutual Safety Ins. Co. *v.* Cohen, 3 Gill, 459. In Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. 249, it was held, that as the legal title passed to the vendees when a ship was necessarily sold, no interest remained in the insured, and they had nothing to abandon, and consequently, an abandonment was not necessary. See Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456, 464, per *Putnam*, J. The question arose in the case of Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604, 623, but the court did not deem it necessary to decide it. They however said: "It may not be amiss to observe, that there is very respectable authority, and that too, founded upon pretty substantial reasons, for saying that no abandonment is necessary, where the property has been legally transferred by a necessary and justifiable sale. 2 Pick. 261, 265." In Smith *v.* Manufacturers' Ins. Co., 7 Met. 448, the vessel was condemned and sold. She could have been repaired, at an expense less than her value when repaired, and no abandonment was made. *Shaw*, C. J., delivering the opinion of the court, held that the insured could not recover for a total loss, on the ground, that the cost of repairs would not have exceeded her value when repaired, but expressed the opinion that, but for this latter fact, the assured would have been entitled to recover, and speaking of Roux *v.* Salvador, as first decided, said: "But the subject has undergone an elaborate discussion in a recent case, in which, after a full review of all the cases, it was held that, even where the property insured had been sold, and the news of the sale arrived as soon as that of the loss, and where there was a total loss, but not an actual total loss by the destruction of the thing itself, there could not be a recovery for a total loss without abandonment, and this is well supported in principle, as well as by authorities." The *dictum* of *Shaw*, C. J., to the point, that if the expense of repairs would exceed the value of the vessel when repaired, the insured might recover as for a total loss, without an abandonment, is supported by the case of Bullard *v.* Roger Williams Ins. Co., 1 Curtis, C. C. 148, where the vessel was condemned and sold. But in American Ins. Co. *v.* Francia, 9 Barr, 390, where the jury found that the cost of repairs would so far have exceeded the value of the vessel when repaired, that no prudent man could have doubted as to the propriety of selling the vessel, and that the sale was made under circumstances which rendered it legal, the court held, that the insured could not recover for a total loss, without an abandonment. Roux *v.* Salvador was also referred to, and a preference expressed for the doctrine laid down in the earlier decision of that case.

The result of the authorities appears to be, that in England, the assured need not abandon in case of a valid sale, but if there is no sale, he must abandon, if the vessel remain in specie, although the expense of repairs would exceed the value of the vessel when repaired. In this country, the authorities are so conflicting, that no general rule

because if he claims for a total loss, he must in any event, account for them.[1]

Whether a partial loss may be converted by abandonment into a constructive total loss, must necessarily depend, in almost all cases, upon the amount of the injury. Originally, it was held, that this could be done only where the ship was incapable of repair or recovery, or if capable, so much injured that when repaired or recovered, she would not be worth what it would cost. Such may be said to be the rule in England now.[2] But, in this country, this has been much modified by a practice, which has become a rule that is in force in nearly all parts of the coun-

can be deduced from them. The *dictum* of *Shaw*, C. J., *supra*, seems inconsistent with the rule, that the valuation is conclusive as to the value of the vessel at all times, which is the settled law in Massachusetts. See post, p. 355, n. 1. In Greely *v.* Tremont Ins. Co., 9 Cush. 415, the ship remained in specie and was sold by the master. The estimated amount of repairs, including the general average charges, amounted to more than the value of the vessel, and to more than her valuation in the policy. Held, that the sale did not render the loss an actual total one of itself, and that the general average expenses were not to be added.

[1] Thus, in Smith *v.* Manufacturers' Ins. Co., 7 Met. 448, *Shaw*, C. J., said: "An abandonment changes the character of the master. It relates back to the time of loss; and as the master is authorized to labor, etc., in saving, for the benefit of all concerned, if there has not been an abandonment, he is the agent of the owner and assured, and if he receives money, it is for their account; if he squanders or wastes it, it is their loss. But, if there has been an abandonment on good grounds, it relates back, and makes the master the agent of the underwriters from the time of the loss, so that, if the salvage has been squandered, it is their loss." If there has been no abandonment, "the salvage is not a set-off, not something belonging to the defendants, to be used to balance the plaintiff's total demand; but it is a sum belonging to the plaintiff, in his own hands, which diminishes his demand *pro tanto*, and to the same extent diminishes the amount he is entitled to recover." See also, Roux *v.* Salvador, 3 Bing. N. C. 266.

[2] In Moss *v.* Smith, 9 C. B. 94, the vessel on a voyage from Valparaiso to London, was injured by the perils of the sea, and put back to Valparaiso. She was there sold, on account of the damage, and the difficulty of raising money to make the repairs. At *nisi prius*, *Wilde*, C. J., instructed the jury as follows: "That if, upon the evidence laid before them, they were satisfied that the vessel was damaged, by perils of the sea, to such an extent that she was not susceptible of repair, so as to enable her to perform the voyage, save at an expense which would exceed her value when repaired, regard being had to the facilities for repair, and for raising money for that purpose at Valparaiso, and the time that would be consumed therein, they must find for the plaintiffs, as for a total loss of the ship; and that, on the other hand, if they thought that the vessel when properly repaired, would be worth more than the sum expended in such repairs, the plaintiffs would be entitled to recover for an average loss only." In the Common Pleas this ruling was held to be correct. See also, Fleming *v.* Smith, 1 H. L. Cas. 513; Irving *v.* Manning, 1 H. L. Cas. 287, 304, 6 C. B. 391.

try; and which was not wholly unknown on the continent of Europe. It is, that if more than half of the property insured be lost, or if the property be damaged to more than half its value, by a peril insured against, this may be made a constructive total loss by abandonment.[1] We say, *more* than half; for it is not

[1] Dwpuy *v.* United Ins. Co., 3 Johns. Cas. 182; Depeyster *v.* Col. Ins. Co., 2 Caines, 85; Wood *v.* Lincoln and Kennebec Ins. Co., 6 Mass. 479; Dickey *v.* New York Ins. Co., 4 Cow. 222, s. c. *nom.* Dickey *v.* American Ins. Co. of New York, 3 Wend. 658; Saurez *v.* Sun Mut. Ins. Co., 2 Sandf. 482; Allen *v.* Commercial Ins. Co., 1 Gray, 154.

The following extracts, when compared with that in the preceding note will show, that as far as the ship is concerned, the principle upon which the American rule is founded, is substantially the same as that of the English cases. In both countries, the loss is total when the vessel becomes a wreck; but under the American rule, she is said to be a wreck, when the expense of repairs will exceed half her value when repaired. In Wood *v.* Lincoln & Kennebec Ins. Co., 6 Mass. 479, 482, *Parsons*, C. J., said: "When a ship becomes a wreck, by any of the perils insured against, it is generally a total loss, and the owner may abandon. And a ship becomes a wreck when, in consequence of the injury she has received, she is rendered absolutely innavigable, or unable to pursue her voyage, without repairs exceeding half her value." In Coolidge *v.* Gloucester Mar. Ins. Co., 15 Mass. 341, 343, *Putnam*, J., said: "But to all legal purposes, after the constructive total loss, the ship, repaired and rebuilt at an expense exceeding half her value, must be considered as a new ship, as much so, to every intent, as if the former owners and the insurers of her had procured a new keel and had wrought up the iron and timbers which could have been obtained, into a vessel of a different kind and form." See Peele *v.* Merchants' Ins. Co., 3 Mason, 27, 74, per *Story*, J. In Allen *v.* Commercial Ins. Co., 1 Gray, 154, 157, *Thomas*, J., said: "It is a general rule in this country, that if a ship is damaged to more than half the value by any peril insured against, the assured may abandon and recover for a total loss. Though a different rule is adopted in England, and this may, perhaps, be regarded as a departure from the original economy of insurance, which was indemnity to the assured, it has the advantage of affording a fixed and definite standard, and is too well settled to be the subject of controversy." And Chancellor Walworth, in American Ins. Co. *v.* Ogden, 20 Wend. 287, 300, observes: "The rule of permitting the assured to abandon, when the vessel has been injured to more than half her value, does not exist in England. It was first adopted in this country, from a similar rule in relation to an insurance upon the cargo, in some of the other maritime countries of Europe; and among other, in France, according to Pothier. See Cleirac, 278, Le Guidon de la Mer, ch. 7, § 1; Pothier, Traite du contrat D'Assur. 118. And it is now adopted as a part of the maritime law of France in terms, by the more recent commercial code of Napoleon; except that the new code requires that the loss should be at least three fourths of the value of the property insured, to authorize an abandonment on that account. Code de Comm. art. 369. As this principle of adopting an arbitrary rule of proportion, between the value of the vessel, and the expense of repairing her at the port of distress, for the purpose of ascertaining the right of the assured to abandon as for a total loss, was substituted for the more uncertain rule which exists in England, of leaving it to the jury to determine, as a matter of fact in all cases, whether the situation of the vessel was such as to make it a justifiable case of abandonment, or of a sale of the ship for the benefit of all parties, the courts of this country should be cautious how they depart

sufficient, that the cost of repairing the vessel would be equal to fifty per cent., but it must exceed that amount, in order that the insured may be entitled to recover.[1]

This rule applies in this country, to ship and goods, but not, as we think, to freight. It does not, however, exclude all cases where the damage is less than fifty per cent., if that damage be not reparable; for if the repairs would cost less than half of her value, but are impossible, because the master has no funds and can raise none, and the owners are too distant for advice or assistance, the master may sell the vessel, this being plainly the best thing he can do.[2] If, however, the vessel is at a port of destination, this rule does not apply, for the owner is obliged to furnish funds at such a place.[3]

from the established rule, or they will find the underwriters and the assured again involved in the ruinous litigation, which the adoption of a fixed and certain rule was intended to obviate."

In Marine Dock & Mut. Ins. Co. *v.* Goodman, 4 Am. Law Register, 481, 496, the court said, that but for the fact that the policy contained a clause, authorizing an abandonment if the damage amounted to fifty per cent., they should follow the English doctrine in respect to what constituted a total loss, in preference to the French rule, "which has been adopted by some American courts."

[1] Fiedler *v.* New York Ins. Co., 6 Duer, 282.

[2] Ruckman *v.* Merchants' Louisville Ins. Co., 5 Duer, 342. In this case, *Duer*, J., states the law as follows: "When the impossibility of making the necessary repairs, is occasioned by the want of materials and workmen, it is not denied that such is the law; but we consider the law to be just as clearly settled that it is quite immaterial, whether the impracticability of making repairs, when the vessel is in a port of distress, proceeds from the want of materials and workmen, or of the necessary funds or credit. It is the existence of the fact, and the necessity of breaking up the voyage, which it creates, that justify an abandonment."

And *Thomas*, J., in Allen *v.* Commercial Ins. Co., 1 Gray, 154, 158, said: "But the right to abandon and claim for a total loss, existing in cases of injury to an amount greater than half the value of the ship, is not restricted to them. If this vessel had been in a port of necessity, in the condition described in the report, and the master had found it impossible to obtain the requisite funds for her repair by bottomry or otherwise, or to consult the owners, a sale might have been justified; and upon abandonment, no lien or incumbrance having been created to deprive the underwriter of the rights which it is the object of an abandonment to secure, a total loss might have been claimed, though the cost of repair would have been less than fifty per cent." See also, Williams *v.* Smith, 2 Caines, 13, and next note.

[3] American Ins. Co. *v.* Ogden, 20 Wend. 287. In Allen *v.* Commercial Ins. Co., 1 Gray, 154, the vessel arrived at her port of destination in such a condition, that her estimated repairs were $5,248. This sum, after deducting one third, new for old, was less than half her value. The owners were present, but as they had no funds, the vessel was sold. Held, that the underwriters were not liable for a total loss. And even in

There seems to be but one limitation or exception to the rule of fifty per cent., although even this may not be entirely certain; it is, that if the vessel actually perform the voyage insured and reach her terminus *ad quem*, there can be no abandonment of her merely because she needs repairs from perils insured against, which will cost more than half her value.[1]

Many questions arise in respect to the estimate or computation of this half or fifty per cent. of damage. Thus, can the allowance usually made, of *one third new for old*, in settling a partial loss, be first deducted? If a vessel newly coppered meets with an accident, requiring that her copper should be taken off and renewed, or if her new sails be blown away and the cost of other new ones must be furnished by the insurers, the owner gains nothing. If the copper or the sails be nearly worn out, he may gain by new ones nearly their whole value. It is very difficult to estimate the particular facts of each case, so as to apply the principle of indemnity. And a custom has grown up, to deduct, in all cases, one third from the cost of new materials, as

a port of necessity, the master is not authorized to sell the vessel for want of means to repair her, if such means can be obtained by the exercise of proper diligence, either on the credit of the owner, or by pledging as security a part or the whole of the interest under his charge. And, indeed, the diligence and efforts of the master are not to be limited, in all cases, to the port in which the vessel has found a refuge. Ruckman *v.* Merchants' Louisville Ins. Co., 5 Duer, 342.

[1] In Peters *v.* Phœnix Ins. Co., 3 S. & R. 25, it was held in such a case, that the assured might abandon and recover as for a total loss. The point, that the voyage had been completed, does not seem to have been considered. See also, Ralston *v.* Union Ins. Co., 4 Binn. 386. It was held the other way in Pezant *v.* National Ins. Co., 15 Wend. 453, and in Parage *v.* Dale, 3 Johns. Cas. 156. In Scottish Marine Ins. Co. *v.* Turner, 4 H. L. Cas. 312, note, 20 Eng. L. & Eq. 24, 37, Lord Chancellor *Cranworth* said: "I am not aware, indeed, of any previous case in which, after a ship had actually performed her voyage, the owners have been permitted, even between themselves and the underwriters on the ship, to treat an injury sustained on the voyage as a total loss, and abandon the ship to the underwriter after her arrival in port." See also, the language of Lord *Truro*, on page 39. The case referred to, was that of Stewart *v.* Greenock Marine Ins. Co., 2 H. L. Cas. 159, in which an abandonment was allowed after the vessel's arrival. But if she arrives a mere wreck, it would seem that an abandonment might be made, or the loss considered a total one with salvage.

In Ralston *v.* Union Ins. Co., 4 Binn. 386, it was held, that if the vessel arrived at her port of destination, the assured could not abandon, if the injury previously sustained did not amount to fifty per cent., although the ship could not be repaired at all at that port, and was not sea-worthy to go to another.

upon the whole and by way of average, about what indemnity would require. Now, shall this deduction, "one third off, new for old," be made when the question is, whether the loss, which would otherwise be total, becomes partial if the deduction is made? A ship will be worth $20,000 when repaired. These repairs will cost $14,000. If one third is to be deducted, they will not equal half of her value, and the loss will not be total, nor can there be abandonment. If one third is not to be deducted, the loss is then more than fifty per cent. This question has been much disputed. Many policies expressly provide, that the fifty per cent., shall be adjusted as for a partial loss; that is, that the one third shall be deducted; or, in other words, the loss must be more than three fourths of her value. But the later and stronger authority, and we think the better reason, would require that this one third should not be deducted, or, what comes to the same thing, if deducted from the repairs, should be deducted from the value of the ship, unless this deduction from the repairs be expressly stipulated.[1]

[1] The doctrine of the text has been sustained by the Supreme Court of New York, in Dwpuy *v.* United Ins. Co., 3 Johns. Cas. 182; by Mr. Justice *Story*, in Peele *v.* Merchants' Ins. Co., 3 Mason, 27, 73, after a very thorough consideration of the question; by the Supreme Court of the United States in Bradlie *v.* Maryland Ins. Co., 12 Pet. 378; and by the Court of Chancery in Mobile, Ala., in Marine Dock & Mut. Ins. Co. *v.* Goodman, 4 Am. Law Register, 481, 497. This last case proceeds on the ground, that the market value of the vessel is injured by being repaired to the extent of one third the cost of repairs, as much as the new work is worth one third more than the old. See also, Phillips *v.* St. Louis Perpet. Ins. Co., 11 La. Ann. 459; and *dicta* by Senator *Allen*, in Am. Ins. Co. *v.* Center, 4 Wend. 45, 54, and by *Gibson*, J., in American Ins. Co. *v.* Francia, 9 Barr, 390.

On the other hand, it is held, that one third is to be deducted in all cases, in Smith *v.* Bell, 2 Caines, Cas. 153; Pezant *v.* National Ins. Co., 15 Wend. 453; Fiedler *v.* New York Ins. Co., 6 Duer, 282; Hooper *v.* Whitney, 19 La. 267. In Massachusetts, the following clause has been introduced into the policies: "It is agreed, that the insured shall not have the right to abandon for the amount of damage merely, unless the amount which the insurer would be liable to pay under an adjustment as of a partial loss, shall exceed half the amount insured." This clause, it appears, was introduced on account of the decision of Mr. Justice *Story*, in the above case of Peele *v.* Merchants' Ins. Co. See Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456, 467. In several cases containing this clause, where the question has come up, the decision that the deduction is to be made, has proceeded as much on general principles and usage, as on any effect given to this clause, it being considered as merely affirming the law. Sewall *v.* United States Ins. Co., 11 Pick. 90; Winn *v.* Columbian Ins. Co., 12 Pick.

Another question is, whether the valuation in the policy is to be taken, in determining whether the amount of damage will justify an abandonment, or is to be set aside and the actual value taken.[1] The authorities are not only irreconcilable, but our note

279; Deblois *v.* Ocean Ins. Co., 16 Pick. 303; Allen *v.* Commercial Ins. Co., 1 Gray, 154. The policy in the above case of Deblois *v.* Ocean Ins. Co., contained the clause in question, although this fact does not clearly appear in the report of the case.

And where the insurers are not to be liable for a partial loss under a certain per cent., it has been held, that one third is to be deducted in making up this percentage. Wallace *v.* Ohio Ins. Co., 4 Ohio, 234; Perry *v.* Ohio Ins. Co., 5 Ohio, 305.

In Robinson *v.* Commonwealth Ins. Co., 3 Sumner, 220, the question was whether there was a total loss of the cargo by the breaking up of the voyage, on account of the total loss of the ship. The policy contained the clause referred to. It was held by *Story*, J., that it was solely applicable to the case of an insurance upon the ship, and had nothing to do with an insurance upon the cargo. See also, post, ch. xii. tit. Partial Loss.

[1] The valuation is set aside, and the value at the time of the loss taken in the following cases. Peele *v.* Merchants' Ins. Co., 3 Mason, 27; Bradlie *v.* Maryland Ins. Co., 12 Pet. 378. See also, Marine Dock & Mut. Ins. Co. *v.* Goodman, 4 Am. Law Register, 481; Fontaine *v.* Phœnix Ins. Co., 11 Johns. 293; Center *v.* American Ins. Co., 7 Cow. 564, 579.

In Massachusetts, the valuation in the policy is considered conclusive. The reasons which led to this result are so ably set forth by Mr. Justice *Putnam*, in Deblois *v.* Ocean Ins. Co., 16 Pick. 303, 312, that we are induced to cite them somewhat at length: "In regard to the value, we must recollect it was fixed by the agreement of the parties. It is admitted, that if the vessel were absolutely lost, when returning to her home port, after a three years' voyage and essential deterioration, the value in the policy should be paid. And we cannot perceive any good reason, why that value should not govern, as well when the assured claims for a technical total loss, as when he claims for a loss by the total destruction of the ship; and why it should not govern when the assured would lose, as well as when he would gain by it. If the vessel sustained damage at a time when she was in great demand, the owner would repair her. If at a place where there was an embargo, and where vessels were of comparatively little value, then he would work up the repairs to more than half her value in the market there, claim for the whole, and throw the vessel upon the underwriter. Wreck or not, total or partial loss, would depend upon the ever shifting state of the market, and not as it should, upon the condition of the ship. She might be almost worthless at the place where she was damaged, and in another, and perhaps not distant port, would sustain a fair and reasonable value. It was to avoid these and other uncertainties, and causes of litigation and dispute, that the parties agreed upon the valuation in the policy. It was to continue the same, although the vessel should grow worse. It was to continue the same wherever she might go under the policy, although she might in some places be worth more, and in some places less, than the value agreed on. It was to be coextensive with the voyage as to time and place." In this case, the vessel was valued at $6,000, the repairs were estimated at $3,798, and the ship was sold at auction for $1,708. See also, Winn *v.* Col. Ins. Co., 12 Pick. 279; Hall *v.* Ocean Ins. Co., 21 Pick. 472; Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456; Allen *v.*

will show that they are so equally balanced, that no rule can be stated as the prevailing one. On the reason of the case, we are inclined to hold, that the valuation should not apply to the question of total loss by construction, unless this be stipulated in the policy.

It is also a question, whether the premium should be included; and we are of opinion, that it should not, — or else that it should be included also, in estimating the amount of the value insured.[1]

Commercial Ins. Co., 1 Gray, 154. In New York, the rule seems to be the same as in Massachusetts. American Ins. Co. *v.* Center, 4 Wend. 45; American Ins. Co. *v.* Ogden, 20 Wend. 287. In Howell *v.* Philadelphia Mut. Ins. Co., U. S. C. C., Maryland, 25 Hunt's Merch. Mag. 80, the policy contained a clause stipulating that the valuation should be conclusive in case of a constructive total loss.

In England, we have seen, that a constructive total loss is one, where the vessel when repaired, would be worth less than the cost of repairs, while some authorities in this country, consider such a loss an actual one, to recover for which no abandonment is necessary. This latter rule may sometimes conflict very much with the rule, that the valuation is conclusive. If a vessel is at an intermediate port in such a condition, that the cost of repairs would not exceed half the valuation in the policy, but the vessel when repaired would be worth less than the cost of the repairs, according to the one rule, the assured could not recover for a constructive total loss, while according to the other, he could recover for an actual total loss, without an abandonment.

The question came up in the case of Hyde *v.* La. State Ins. Co., 14 Mart. La. 410. The vessel was injured by a collision, to an extent less than half the valuation, but she was in so rotten a state, that the cost of repairs would have exceeded her value when repaired, and the court held that the assured could not abandon and recover for a total loss. And in Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456, evidence that the vessel after being repaired, would have been of less value than before the injury happened, was rejected as inadmissible.

In the late case of Irving *v.* Manning, 1 H. L. Cas. 287, 6 C. B. 391, the vessel was valued at £17,500, the cost of repairs would have amounted to £10,500, and the ship would have been worth £9,000. An abandonment was duly made. If the valuation had been taken as conclusive of the value of the vessel at the intermediate port, the loss would not have been total, but the court held, that the valuation was conclusive only "for the purpose of ascertaining the amount of compensation to be paid to the assured, in order to avoid disputes as to the quantum of the assured's interest;" but that it did not mean, that when a question should arise whether it would be worth while to repair, the valuation was to be taken as conclusive of the value of the vessel. So, in Allen *v.* Sugrue, 8 B. & C. 561, where the vessel was valued at £2,000, and could have been repaired for £1,450, but the jury found that the vessel was not worth repairing, the court held that the loss was total. See also, Edington *v.* Jackson, and Herne *v.* Ray, cited 1 H. L. Cas. 297; same cases *nom.* Eggington *v.* Lawson, and Herne *v.* Hay, cited 6 C. B. 414; Young *v.* Turing, 2 Man. & G. 593.

[1] In Brooks *v.* Oriental Ins. Co., 7 Pick. 259, the insurer was not to be liable for

Neither are the wages and provisions of the crew, during a detention, to be included as a part of the loss. And if repairs are made, and the crew are employed in making them, their wages will not be included.[1] Surveyors' fees, and other expenses incurred in ascertaining the cause of the loss, are not included.[2] But payment of salvage due from the ship,[3] would be included. And a loss by payment of general average contribution; or a loss, giving rise to a claim for contribution, but of which the contribution is not yet paid, should, we think, be included (where nothing in the policy prevents it), and the insurers take by abandonment the claim for contribution.[4] But if the contribution

any partial loss, unless it should amount to five per cent. It was held, that the percentage should be recovered on the valuation, after deducting the premium. See ante, p. 67, n. 2. In the absence of any express agreement, it would seem, that the same rule should apply in estimating the fifty per cent.

But in Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456, the question came up on a policy containing the clause: "It is agreed, that the insured shall not have the right to abandon the vessel for the amount of damage merely, unless the amount which the insurer would be liable to pay, under an adjustment of a partial loss, should exceed half the amount insured." *Putnam*, J., said: "But the meaning of the clause in the policy concerning the right to abandon on account of damage exceeding fifty per cent. of the amount insured, is too plain for construction or explanation. The premium is expressly made to be part of the amount insured, and the damage to be paid must exceed half that amount, calculating the same as under the adjustment of a partial loss." In Louisville Marine & F. Ins. Co. *v.* Bland, 9 Dana, 143, it was held, that in ascertaining the value under an open policy the whole premium is to be added to the prime cost, and other charges at the port of shipment, and that in estimating the value of a portion of the cargo, of which the entire valuation only is stated in the policy, a proportional part of the premium should be included.

[1] See post, ch. xii., tit. Partial Loss.

[2] Fiedler *v.* New York Ins. Co., 6 Duer, 282; Hall *v.* Ocean Ins. Co., 21 Pick. 472, 478.

[3] Bradlie *v.* Maryland Ins. Co., 12 Pet. 378.

[4] In Massachusetts, owing probably to the clause making the right to abandon, depend upon the loss amounting to fifty per cent. when adjusted as a partial loss, it is held, that those charges which are properly the subject of general average contribution, are not to be considered in making up the fifty per cent. Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456; Hall *v.* Ocean Ins. Co., 21 Pick. 472; Reynolds *v.* Ocean Ins. Co., 22 Pick. 191. See also, Fiedler *v.* New York Ins. Co., 6 Duer, 282. And it was so held, in a case where the vessel was in ballast at the time, and there was no cargo or freight to contribute. Greely *v.* Tremont Ins. Co., 9 Cush. 415.

That, generally, general average charges may be estimated in computing the damages, was recognized in Pezant *v.* National Ins. Co., 15 Wend. 453, but as the same person owned both ship and freight, the court held he could not recover from the underwriter on the ship the whole amount, but must first deduct the proportion due

has been paid, only the balance of loss, after deducting this contribution, is to be included in the fifty per cent.

The expense of repairs is, in general, to be estimated at the place where they were actually made, or at which they would have been made, if made at all. But if a vessel can be partially repaired at a port of distress, so that she can be taken to another port and there fully repaired at a less expense than at the first port, it would seem to be the duty of the assured to do this, and consequently, the underwriters are only liable for the lesser expense.[1] But the cost of navigating the vessel from the port of distress to the port where the final repairs are to be made is to be added, if such a port is one to which the vessel would not have gone in the course of the voyage.[2] And, although the pro-

from the cargo and freight, and then the remainder could be added to the other items to make up the fifty per cent.

In regard to the cargo, it has been held in Massachusetts, that goods lost by jettison may properly be taken into the estimate in making up the amount of more than fifty per cent., necessary to authorize an abandonment. Forbes *v.* Manufacturers' Ins. Co., 1 Gray, 371. See also, Moses *v.* Columbian Ins. Co., 6 Johns. 219.

[1] Center *v.* American Ins. Co., 7 Cow. 564, 4 Wend. 45. It was held in this case, that the assured had a right to have his vessel placed *in statu quo*, and that if she had been coppered before the accident, the expense of sheathing her with the same material should be taken into account, although a sheathing of wood might render her seaworthy for the voyage. The expense of the temporary repairs added to the cost of the final repairs at the port of destination, would have amounted to more than half her value, and the question therefore did not arise, whether, had temporary repairs been sufficient to enable the vessel to perform her voyage, and at the port of destination thorough repairs might have been made, the whole cost of which, would have been less than half the value, the assured could have abandoned if the entire repairs at the port of distress would have been more than half the value.

In Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456, the vessel put into Malaga in distress, and the court held, that if the master could not have made complete repairs at Malaga for less than one half the value of the vessel, but could have made partial repairs there, and then have carried his vessel to Gibraltar, and there have made complete repairs, and the whole expense would not have exceeded one half of such value, the master was bound to do this, and the loss was not total. So, in Hall *v.* Franklin Ins. Co., 9 Pick. 466, where the cost of repairs at the port of distress, would have exceeded the value of the vessel, the court held the loss was not total, as the vessel might have been safely navigated to another port and there repaired, and the whole expense would have been less than half the value of the vessel. See, contra, Saurez *v.* Sun Mutual Ins. Co., 2 Sandf. 482, where the court held, that the assured was entitled to have full repairs made at the port of necessity, and might abandon, if the expense there was greater than half the value of the vessel, although the captain had made temporary repairs and was on his way to another port for full repairs.

[2] Lincoln *v.* Hope Ins. Co., Sup. Jud. Ct., Mass., March T. 1857.

cess of repair or renewal, replaces with sound materials those which had been deteriorated by time and natural decay, it does not seem that any allowance is to be made for this.[1] And the insured is entitled to have the damage done by the peril insured against completely and thoroughly repaired, and it is not enough, to prevent the insured from abandoning, that the vessel could be rendered sea-worthy at an expense less than fifty per cent.[2] If the value of the ship may be affected by its place of building or national character, these circumstances are to be considered in determining whether the loss is partial or total, and her actual value, under the influence of these circumstances, is to be taken as the foundation of the estimate.[3]

[1] In Depeyster *v.* Col. Ins. Co., 2 Caines, 85, the vessel's bottom, at the time of sailing, was a little worm-eaten, but she was a sea-worthy vessel. She was afterwards sold at a port of distress, it being the opinion of the surveyors, that it would have cost more than the vessel was worth to repair her. At the trial before the jury, the judge charged, "that if, in calculating the repairs, they believed any were necessary on account of injuries received from worms prior to the vessel's sailing, the expense of such repairs should not be included in the estimate." This direction was held to be incorrect, and the rule was laid down, that if repairs were rendered necessary by a peril insured against, they ought to be made, without any other examination of the antecedent state of the vessel, except to determine the fact of her being sea-worthy. So held, also, in Depau *v.* Ocean Ins. Co., 5 Cow. 63. In Hyde *v.* Louisiana State Ins. Co., 14 Mart. La. 410, the vessel was injured by a collision, and abandoned. The court considered the following facts to have been determined by the testimony: that at the time of the abandonment, the cost of repairs would have been more than the value of the vessel; that if she had met with no accident she might have been run in the state she was in for eighteen months; and, that the damage sustained by the collision did not amount to half the value of the vessel. The court held, that the loss was not total, and laid down the rule, that where injury is done to an old vessel, and she cannot be repaired in such a manner as to be used as before the accident but at an expense exceeding one half the value, or in other words, where the injury which the insurers are obliged to make good, is the cause of the decaying parts requiring repairs, then the insured may abandon. But if repairs may be put upon her so that she will be *in statu quo*, though not in a sea-worthy condition, at an expense not exceeding one half the value, then the loss is not total. This seems to be the intent of the language of Mr. Justice *Story* in Peele *v.* Merchants' Ins. Co., 3 Mason, 27, 77. See also, Cazalet *v.* St. Barbe, 1 T. R. 187, where the jury found that the expense of repairs would amount to 48*l.* per cent., but that the ship was not worth repairing, and the court held that the plaintiff was not entitled to recover.

[2] Lincoln *v.* Hope Ins. Co., Sup. Jud. Ct., Mass., March T. 1857.

[3] Young *v.* Turing, 2 Man. & G. 593, 2 Scott, N. R. 752. In this case, a Dutch ship was stranded on the coast of England. It was shown that had she been a British ship, it would have been prudent to repair her, but not being one, her value in England when repaired, would have been less than the cost of repairs, and in Holland, owing to the peculiar usages of trade in that country, the result would have been the

If the repairs cost less than fifty per cent., and the ship be bottomed to raise the money to pay for them, and sold under the bottomry bond, it would seem that this would be a total loss (all things being done in good faith and for good reason), unless the ship came within the reach of the owner, so as to give him an opportunity of discharging the bottomry bond; for then the vessel is lost by his own act or neglect.[1] If the insurers are notified of the bottomry bond and requested to discharge it, their refusal or neglect to do so, has been supposed to give the assured the right to let the ship go and claim for a total loss; but such a conclusion would create an obligation out of the assurers' conduct which the common principles, either of contracts generally, or of insurance, would not seem to justify; for even if the insurers were bound to discharge this bond, they should be answerable only for the necessary or direct and immediate consequences of not doing so.[2] But insurers are liable for the marine interest paid on bottomry or hypothecation, where the same was properly made.[3]

If at the time the abandonment is made, the master has

same. Held, that the jury should take these facts into consideration in determining whether the loss was total or not.

[1] We have seen, ante, p. 352, n. 2, that if, without fault of the owner, funds cannot be obtained to repair a vessel, an abandonment may be made, although the vessel may not be injured to the extent of fifty per cent. of her value. From analogy the same may be true where the vessel is sold under a bottomry bond, the owner being in no fault whatever, but this case can seldom arise (except where the assured can only procure the funds on a bond payable at some port out of the course of the voyage), for the bottomry bond cannot generally be enforced until the vessel arrives at her port of destination, where it is the duty of the owner to provide funds, for it is well settled that if the sale is caused by the fault or neglect of the owner in paying the bond, the underwriters are not liable. Bradlie *v.* Maryland Ins. Co., 12 Pet. 378. See also, Depau *v.* Ocean Ins. Co., 5 Cow. 63; Humphreys *v.* Union Ins. Co., 3 Mason, 429. So held also where the vessel was sold to pay salvage. See post, p. 370, n. 2.

[2] This question was much discussed in the case of Bradlie *v.* Maryland Ins. Co., 12 Pet. 378, and it was held that the underwriters were not bound in case of a partial loss, and money taken up on bottomry, to pay the bond, and that they were therefore not liable for the consequences of their neglect so to do. But if the underwriters order the repairs, for the payment of which a bottomry bond is given, and they then refuse to pay the bond, and the ship is sold, they are liable for all the damage which accrues to the owner in consequence of such refusal. Da Costa *v.* Newnham, 2 T. R. 407.

[3] Bradlie *v.* Maryland Ins. Co., 12 Pet. 378, 405, per *Story*, J. But if after a sale of the vessel, which the underwriters have refused to ratify by accepting the vessel, a bond be given, they are not liable for the marine interest. Jumel *v.* Marine Ins. Co., 7 Johns. 412.

commenced to repair the vessel, the abandonment is invalid, and the assured can only recover for the expense incurred, although it exceeds half the value of the vessel.[1] The authorities are, however, conflicting as to whether the insurer has the right, in case of loss, to offer to repair the vessel, and thus to escape liability for more than the actual cost.[2] This question depends in a

[1] This proceeds on the ground that the state of facts existing at the time of the abandonment determines the right of the assured to abandon. Humphreys *v.* Union Ins. Co., 3 Mason, 429; Dickey *v.* American Ins. Co., 3 Wend. 658; Dickey *v.* New York Ins. Co., 4 Cow. 222; Depau *v.* Ocean Ins. Co., 5 Cow. 63. In Ritchie *v.* United States Ins. Co., 5 S. & R. 501, the vessel and cargo were insured on a voyage from Philadelphia to Corunna. At a port of distress the vessel was repaired, and the whole cargo sold to pay for the expense thereof. After the repairs were begun, but before the cargo was sold, an abandonment was made. The assurers paid for the cargo, and the court held that as the cargo had paid for the repairs, and the defendants had paid for the cargo, it was the same as if they had paid for the repairs in the first instance.

In Saurez *v.* Sun Mutual Ins. Co., 2 Sandf. 482, it was held that if the repairs are made merely to carry the vessel from one port to another, in order to make full repairs at the latter port, the right to abandon is not gone.

[2] In Ritchie *v.* United States Ins. Co., 5 S. & R. 501, the court said: "If the insurer will undertake to repair the damage, though exceeding one half the value, he may do it, and the assured shall not abandon, because if his ship be repaired it is all he has a right to demand, and the more or less cost is immaterial to him." This dictum is founded on the case of Hart *v.* Delaware Ins. Co., 2 Wash. C. C. 346, where Mr. Justice *Washington* instructed the jury that "the insured had a right to abandon, unless the underwriters would agree, at all events, to pay for the repairs, although they should exceed what the underwriters would have been answerable for if only a partial loss had happened." These remarks must, however, be confined to the case then before the court, which arose on the fact that the agent of the assured requested the agent of the underwriters to repair the vessel, and he refused to pay for more than a partial loss, whereupon an abandonment was made. The ruling then seems to be that if the assured is willing to waive an abandonment on condition that the underwriter will pay the expenses of repair, the latter must agree to perform the condition, or he cannot have the advantage of it. In Peele *v.* Merchants' Ins. Co., 3 Mason, 27, 62, Mr. Justice *Story*, after citing the above cases, said: "I know of no judgment where it has been held, that in a case of capture, embargo, or blockade, the right of the insured to abandon, can be intercepted by an offer of the underwriters to indemnify and pay all the expenses. And, indeed, if it could be by such an offer, then an abandonment in all such cases would be perfectly nugatory, for the policy always imports on the part of the underwriters an agreement to this effect. And yet, if the principle be correct, I do not perceive why it is not equally as applicable to a case of capture as of sea damage, to a case of blockade as of shipwreck. It is said, indeed, that the contract of insurance is a contract of indemnity only; and therefore if the underwriters will bear all the expenses, there is no ground to claim more, and if all the expenses are paid, the insured is completely indemnified. This is true in a general sense, *sub modo*, but not universally. The insured by the same law has a right of abandonment, and this right is the result of the construction of the same contract,

great measure upon the one which we are about to consider, namely, whether, after an abandonment has been made, the underwriters may take the vessel and repair her and tender her back to the insured, provided the cost of repairs does not exceed half the value.[1] If such a right exist, it is manifest that they

which is called an indemnity. It appears to me, meaning to speak with all deference for other judgments, to be introducing a new element of discord into the law of insurance, to allow the right of abandonment to be a shifting right, dependent upon the will of both of the parties, and to be defeated by any act of one, after it has rightfully attached by the act of the other. And I am yet to learn how it is, that an offer made at the time of abandonment to pay all expenses, can have more efficacy than the same offer, incorporated as it is in the original terms of the policy." See also, Dickey *v.* American Ins. Co., 3 Wend. 658. The language of *Parsons*, C. J., in Wood *v.* Lincoln & Kennebec Ins. Co., 6 Mass. 479, 484, which has been much relied on in support of the view that the underwriter may offer to repair and thus prevent an abandonment, is as follows: "Where the stranding is under such circumstances, that the attempt to recover and repair the ship, in a reasonable time for the prosecution of the voyage, may be hazardous, but not hopeless; if the underwriter will engage to pay all the expenses, whatever may be the event, the owner cannot abandon, unless he has used such reasonable endeavors to recover his ship, and has eventually failed. And *a fortiori* if the underwriter will himself undertake, at his own expense, for the owner, the recovery of his ship, and shall succeed, and offer to restore her to him, so that he may seasonably prosecute his voyage, the owner cannot abandon, for neither the ship nor the voyage is lost." Mr. Justice *Story* in the above case of Peele *v.* Merchants' Ins. Co., dissents from this doctrine, unless it means that in a doubtful case, where the expense of repairs must be great, though not with certainty one half; or where by the stranding and delay consequent thereon, the voyage may be, but not in all probability must be lost, the owner cannot abandon if the underwriter offers to repair; he says: "There seems much reason for admitting such an offer as a material ingredient in considering whether the owner has a right to abandon."

[1] We shall see hereafter that if the insurer accepts the abandonment, he cannot afterwards say that the loss was merely a partial one. It is also settled that if he refuses to accept, and afterwards does some act inconsistent with a want of ownership, he is to be treated as having accepted. Does, then, the act of repairing, preclude him from setting up his refusal to accept the abandonment? It is so held in Cincinnati Ins. Co. *v.* Bakewell, 4 B. Mon. 541. See also, Ruckman *v.* Merchants' Louisville Ins. Co., 5 Duer, 342, 369. In Peele *v.* Merchants' Ins. Co., 3 Mason, 27, the vessel ran ashore, bilged, and was in a very hazardous position, so that little hopes were entertained of her being got off. An abandonment was made, the vessel was afterwards got off by the underwriters and repaired at an expense less than half her value and tendered back. It was held that the plaintiff was entitled to recover as for a total loss. In a suit in the State court, against another underwriter on the same vessel, the court inclined to the opinion that the underwriter had a right to repair the vessel if he could do so at an expense less than half the value. See also, Wood *v.* Lincoln & Kennebec Ins. Co., 6 Mass. 479.

The Boston policies contain a clause which provides, "that the acts of the assured or insurers in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered a waiver or acceptance of an abandonment." *Putnam*,

can repair before an abandonment, although they may have the right before, but not after, such act.[1] If the insurer repairs, it seems that he must do it in a reasonable time,[2] and he must

J., in Commonwealth Ins. Co. *v.* Chase, 20 Pick. 142, 147, said: "The legal construction would have been according to this express provision." And it is now the settled law in Massachusetts that the assured cannot claim a total loss if his vessel is tendered back to him within a reasonable time. See Reynolds *v.* Ocean Ins. Co., 22 Pick. 191, 1 Met. 160. The question came before Mr. Justice *Curtis*, in a recent case, Gloucester Ins. Co. *v.* Younger, 2 Curtis, C. C. 322. The policy contained the above clause. The insurers contended that the contract was made and was to be executed in the State of Massachusetts, and that it was therefore to be governed by the law of that State. But *Curtis*, J., held that the question was not one "of mere local municipal law," but arose under the law-merchant, and that the interpretation of this branch of the law-merchant, as set forth in Peele *v.* Merchants' Ins. Co., was the true one. And the clause above was interpreted "to have no reference to any other repairs than such as may be needful for the temporary preservation of the property, and its relief from perils within the policy." "And such," adds the learned judge, "I understand to have been the view taken of it in Reynolds *v.* Ocean Ins. Co., 1 Met. 160." The same is stated by Mr. Justice *Sprague* on page 331. We shall, in the next note but one, consider the case of Reynolds *v.* Ocean Ins. Co., and see how far it sustains such an interpretation of the clause in question.

There is a still later decision on this subject in the Court of Chancery, Mobile, Ala., Marine Dock & Mut. Ins. Co. *v.* Goodman, 4 Am. Law Register, 481, where the Massachusetts doctrine is followed in preference to that of Mr. Justice *Story*. The objections of the latter to this doctrine are answered as follows: "It is asked in Peele *v.* Merchants' Ins. Co., 'At whose risk would the ship be during the repairs?' I reply, at the risk of him to whom it should be determined by the suit that the vessel belonged. It is further asked, 'Could the owner sell her so as to oust the right of the underwriter to repair, or must he sell her *cum onere*?' I reply, that a sale by the assured would be a waiver of his claim for a total loss. It is further said, 'suppose an attachment on the property,' and to that supposition I say that a court of equity would enjoin."

[1] Columbian Ins. Co. *v.* Ashby, 4 Pet. 139. In this case, after an abandonment had been made, but before any answer had been received, one who professed to act as the agent of the company offered to supply the money necessary to get the vessel off. The court held that "the assured could not be required to waive an abandonment, which from any thing that he knew might, at that time, have been accepted."

[2] It was so held in Peele *v.* Suffolk Ins. Co., 7 Pick. 254. In Reynolds *v.* Ocean Ins. Co., 22 Pick. 191, the court held "that the jury were rightly instructed, that if the vessel was not got off, repaired and ready, and offered to be restored, within a reasonable time after the underwriters had taken possession of the vessel for that purpose, they must be considered as having made her their own, and accepted the abandonment, and would then be liable as for a total loss." On a new trial, it appeared that the vessel had been voluntarily stranded for the preservation of all concerned, and had been got off and repaired by the defendant's agent, and afterwards tendered to the plaintiffs. It was admitted that the repairs were made with due diligence, but not that she was got off within a reasonable time. The defendants contended "that until the repairs were begun, they were not bound to use diligence and despatch, and therefore that if they were not duly diligent and prompt in removing the brig from the beach

tender back the vessel in as good condition as she was in before the accident, or supply or pay for any deficiencies,[1] and it has

and carrying her to a place of safety, yet this did not evince, nor amount to, an acceptance of the abandonment," but the court instructed the jury that if the defendants, after the abandonment and refusal to accept it, took possession and control of the brig, with the intention of getting her off, repairing and restoring her to the assured, they were from the time when they took possession for such purpose, bound to use reasonable diligence as well in getting her off as in making repairs after her arrival. This instruction was held to be correct. 1 Met. 160. It was argued that the clause in the policy providing that "the acts of the assured or assurers in recovering, saving, and preserving the property insured in case of disaster, shall not be considered a waiver or acceptance of an abandonment," was an agreement that whether the acts were done tardily or negligently could make no difference, and that whatever might be the character of the acts, they were protected by the policy from being regarded as evidence of an acceptance of the abandonment. *Shaw*, C. J., said: "Supposing this view to be correct, still taking possession of the vessel, for another and distinct purpose, is not within this provision in the policy. The act is qualified by the intent and purpose with which it is done. If done solely with a view to save the property, the underwriters were at liberty to do such acts or not, as they should see fit, and to do them in their own time. If done with an intent to repair and restore the vessel, then it was to be done with reasonable diligence and despatch." The purport of this decision, as we understand it, is, that the clause in question has nothing to do with the right of the insured to enter for the purpose of repairing. It is a matter of historical knowledge that the clause was inserted in the Boston policies, after the decision of Mr. Justice *Story* in the case of Peele *v.* Merchants' Ins. Co., *supra*, and it was intended to secure to the underwriters the rights which the law, as then interpreted by the Supreme Court of Massachusetts, gave them. For what purpose, it may be asked, would the underwriters wish to have the right to "*save*" the vessel except that they might "restore" it? That the clause could not have been intended to give the right to make temporary repairs merely, we think is evident from the fact that it was to be done after an abandonment had been made. In Marine Dock & Mut. Ins. Co. *v.* Goodman, 4 Am. Law Register, 481, 495, *Keyes*, Ch., said: "I may add here, that the qualification of the doctrine asserted in Reynolds *v.* Ocean Ins. Co., that the underwriter must repair and tender the vessel within a reasonable time, seems to be unwarranted by the principle upon which the underwriter takes possession and repairs. It is admitted that the loss in the case is not an actual total one, and the inquiry alone that remains on this branch of the cause is, whether the loss amounts to a techical total loss."

[1] In Reynolds *v.* Ocean Ins. Co., 22 Pick. 191, 197, the law is stated by *Shaw*, C. J., as follows: "If the underwriters, after having refused to accept the abandonment, took possession of the vessel, for the actual and declared purpose of getting her off, repairing and restoring her to the assured, and in good faith intended and with reasonable diligence proceeded to make full and complete repairs, and in good faith, according to their intent, did make what they considered and believed to be a substantial repair and restoration of the vessel to as good a condition as she was in before, and in this state tendered her to her owners, it was a substantial performance of their contract, and the assured were bound to accept her; that if at the time of such tender, the assured made no objection to the sufficiency or completeness of the repairs, nor pointed out any deficiency, the tender should be deemed good, although it might be discovered afterwards that there were deficiencies in the repairs. And inasmuch as it may hap-

been held that if in repairing, expenses are necessarily incurred by the underwriters for which they would not have been liable in an action on the policy, they may recover the amount of them from the assured.[1]

There may, perhaps, be a total loss by the sale of the ship by the master.[2] His power and duty in this respect are more fully considered in our first volume. Here it need only be remarked, that he has the power to sell only from necessity, and the sale is valid therefore when made from an actual and stringent necessity;[3] but this necessity must be judged of from the facts and

pen, that after what may be deemed, and what may seem to one or both parties to be a complete repair, some deficiencies may appear, the court are of opinion, that the acceptance of the vessel, by the assured, would not preclude them from claiming any further loss or damage, which might be discovered, but according to the principles of the contract, securing to the assured an indemnity, an action might be maintained, after such acceptance, to recover for any such deficiency, or unrepaired damage, as a partial loss."

[1] Commonwealth Ins. Co. *v.* Chase, 20 Pick. 142. The policy in this case contained a clause exempting the underwriters from general average charges, and partial loss, unless the sum of such loss, which insurers would be obliged to pay under an adjustment as of a partial loss, should amount to fifty per cent. The underwriters repaired the vessel, and the court held they were entitled to recover the amount paid for getting the vessel off a beach, and repairing her, and the agent's expenses. See also, Marine Dock & Mut. Ins. Co. *v.* Goodman, 4 Am. Law Register, 481, 499.

[2] The question whether a sale is justifiable or not, is chiefly important in this connection, in determining whether the underwriters in case of a total loss, are obliged to take the proceeds of the sale as salvage, or whether they may demand the vessel from the vendee. In some cases, however, it appears to be held that a sale made through necessity constitutes a loss *per se*. Such is evidently considered to be the law in England, as is shown by the authorities cited ante, p. 346, n. 4. And the same doctrine is asserted in some cases in this country. Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. 249; Mutual Safety Ins. Co. *v.* Cohen, 3 Gill, 459; Fuller *v.* Kennebec Mut. Ins. Co., 31 Maine, 325. But the better opinion now is, that unless the facts of the case show a total loss independently of the sale, such sale does not make one. Howell *v.* Philadelphia Mut. Ins. Co., U. S. C. C., Maryland, 25 Hunt's Merch. Mag. 80; Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456, 466; Hall *v.* Ocean Ins. Co., 21 Pick. 472, 482; Greely *v.* Tremont Ins. Co., 9 Cush. 415, 422.

[3] In addition to the cases cited in the 1st volume, p. 60, n. 1, see Prince *v.* Ocean Ins. Co., 40 Maine, 481, where after a thorough review of all the authorities, the court held that the jury were rightly instructed when they were told that the sale would be justified if there was an apparent necessity for it, and that no qualification to intensify the word "necessity" was necessary. *Shepley*, C. J., in this case, p. 492, speaking of the power of the master, said: "He is under a moral obligation to pursue that course and make that decision which will best promote the interests of all for whom he has become the agent. He must do wrong if he does not do so. He has no alternative left, and must sell, if in the faithful discharge of that duty, he determines that the

probabilities existing at the time and apparent to the master, and not by the result.[1] Nor is the master at liberty to sell without notice to, or the advice of, the owners, provided he be so near them that he can delay the sale for this purpose without endangering a greater loss.[2] And if he cannot thus communicate with the owners, but knows that the ship is insured, and can communicate with the insurers, we should say he is bound to do so.[3]

If in a port where the insured should have funds, the master sells the vessel to prevent a forced sale by process of law to pay off workmen who have a lien on the vessel, the insured cannot abandon, because the loss was caused by his neglect.[4] And the master cannot sell if the vessel might be repaired but for the negligence of the resident agents of the owner.[5] And if the master is part-owner, he has no greater power to sell, so as to affect insurers, than if he was the master only.[6]

If the master sells, he cannot buy; and if the port warden, surveyor, or any person authorizing or officially promoting the sale, should buy, it would be a most suspicious circumstance, although not perhaps sufficient, of itself, to avoid the sale.[7]

It is frequently said that in determining whether the master should have repaired the vessel, instead of selling her, or should have forwarded the cargo instead of breaking up the adventure at the intermediate port, regard should be had to the question whether a prudent owner, had he been present and uninsured, would have acted as the master did.[8] But we think this language

calamity will be most alleviated, and the interests of all be best served by a sale. A moral necessity for a sale can mean no more."

[1] See Prince *v.* Ocean Ins. Co., 40 Maine, 481, and cases ante, Vol. I., p. 61, n. 1.

[2] See cases ante, Vol. I., p. 64, n. 3; Robinson *v.* Georges Ins. Co., 17 Maine, 131.

[3] See Hall *v.* Ocean Ins. Co., 9 Pick. 466.

[4] Ruckman *v.* Merchants' Louisville Ins. Co., 5 Duer, 342, 368.

[5] Tanner *v.* Bennett, Ryan & M. 182.

[6] Prince *v.* Ocean Ins. Co., 40 Maine, 481.

[7] The general rule is that a vendor cannot become a vendee, and that a sale in such a case is void, and the parties have no greater privileges than before the sale. Church *v.* Marine Ins. Co., 1 Mason, 341; Barker *v.* Marine Ins. Co., 2 Mason, 369. In Hall *v.* Franklin Ins. Co., 9 Pick. 466, the question arose whether a sale at which one of the owners, but not the plaintiff, became the purchaser, was valid. The jury were instructed that the purchase by him could not affect the right of the other owners to recover. When the case came before the full bench, the sale was held invalid on other grounds, and this question was not decided. See also, post, § 8.

[8] Thus in Fleming *v.* Smith, 1 H. L. Cas. 513, 534, Lord *Campbell*, C. J., said: "If

is to be regretted. Nothing is more certain or more obvious, than that the rule that a sale by the master is justified only by "a stringent necessity," and the rule that "a sale by the master is justified if a prudent owner, under the same circumstances, would have made it," are not only two rules, but two very different rules. If a prudent selection from alternatives be not the same thing as an adoption of a course which is forced upon one, or if choice be not the same thing as compulsion, then the law cannot hold both of these rules. It must select one and enforce it; and that is the law of necessity. The most it can do with the other, is to use it by way of illustration; and to use it so carefully that it shall not itself seem to be the rule. Indeed it seems to be used with this caution in cases of the highest authority. And as the sale by the master is not valid, unless it is not only the result of necessity, but is also made in entire good faith, the inquiry whether a prudent owner, then and there present, would have done as the master did, may aid the jury in determining whether this good faith had been perfectly preserved.[1]

a prudent person uninsured, would not have repaired the vessel, but would have sold it to be broken up, that amounts to a total loss." And in Irving *v.* Manning, 1 H. L. Cas. 287, 304, *Patteson*, J., said that, in considering whether the vessel should have been repaired, "the course has been in all modern times to consider the loss as total, where a prudent owner uninsured would not have repaired." See also, Poole *v.* Protection Ins. Co., 14 Conn. 47, 58; Prince *v.* Ocean Ins. Co., 40 Maine, 481. In Domett *v.* Young, Car. & M. 465, *Gurney*, B., charged the jury as follows: "The main question in this case is, whether the loss was a total loss, or a partial loss; and in determining that question you will have to consider whether the owners of the ship, as prudent men, and exercising a sound judgment, would if they had been uninsured, have sold the vessel, or whether they would have employed persons to try and get her off, and, if successful, have repaired the vessel for themselves." See also, Young *v.* Turing, 2 Man. & G. 593, 2 Scott, N. R. 752; Roux *v.* Salvador, 3 Bing. N. C. 266, per Lord *Abinger*, C. J.; Ruckman *v.* Merchants' Louisville Ins. Co., 5 Duer, 342, 363.

[1] Thus in Winn *v.* Columbian Ins. Co., 12 Pick. 279, the jury were instructed that in regard to the sale much would depend upon the fact whether an owner uninsured would have acted as the master did. The jury having found a verdict for a partial loss, the plaintiff moved for a new trial on account of misdirections of the court, on the ground that as the power of an owner and a master was different in respect to a vessel, the one having the absolute control, and the other being but an agent with no power to subject the property to unusual or extraordinary perils, the way an owner would act was no test as to the duty of the master. *Shaw*, C. J., in delivering the opinion of the court, said: "There are undoubtedly points of difference between the condition and powers of a master, and those of an owner. But it does not appear to the court that it was intended to suggest to the jury, that the parallel was complete in

Whether the insured or the insurers are answerable for a mistake of the master, either in selling without necessity, or in the

all particulars. It is the well-known rule on this subject, that to warrant a sale it must be made to appear to the satisfaction of the jury, not only that there was an actually existing, inevitable necessity for breaking up the voyage and abandoning the ship, but that in determining upon that measure, the master acted with competent skill and judgment, with due care, diligence, and attention, and with strict fidelity. In testing the conduct of the master in these particulars, it seems to the court not an unfit illustration, to inquire how an owner, interested to the amount of the property would act under like circumstances. It is at least a test of the honesty and sincerity, the zeal and perseverance with which he acts for the benefit of those concerned in the preservation of the property under his charge, and with this view it appears to us to have been used." And in Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604, 621, the jury were instructed that if it was absolutely necessary, and for the interest of all concerned, that the vessel should be sold, and that a prudent and discreet owner placed in like circumstances, would have come to the same conclusion and sold the vessel, and if from all the circumstances of the case the sale was justifiable, the defendants were liable. The court held that "the professional skill, the due and proper diligence of the master, his opinion of the necessity, and the benefit that would result from the sale, to all concerned, would not justify it; unless the circumstances under which the vessel was placed, rendered the sale necessary in the opinion of the jury." But in Robinson *v.* Commonwealth Ins. Co., 3 Sumner, 220, 227, Mr. Justice *Story* seems to have confounded the necessity and the good faith, and to have allowed in proof of the necessity, what should have been only evidence of good faith. The insurance was on memorandum articles. The vessel was sold at an intermediate port, and one question was whether the master was justified in selling her, instead of repairing her and prosecuting the voyage. Speaking of the moral necessity which would authorize the master to sell, *Story*, J., said: "In short, I know not, how better to put the case of such a moral necessity than to say, that it is such an act of sale, as under like circumstances, a considerate owner who was uninsured would adopt for his own true interest, and that of all concerned in the voyage."

The remarks of *Walworth*, Ch., in American Ins. Co. *v.* Ogden, 20 Wend. 287, 302, on this subject, are replete with sound sense and reason: "The principle of submitting it to a jury in each case, to decide what a prudent owner would do, for the purpose of determining the right of the assured to abandon, would necessarily lead to ruinous litigation, and would deprive both the insurers and the assured of all the benefits intended to be secured to them by the adoption of the rule as to the extent of the repairs exceeding half the value of the vessel. It appears to me to be wholly inconsistent with reason and justice to permit both rules to stand together. The question as to what a prudent owner would do, may be a very proper rule of decision in a case of stranding, and before it is known whether a vessel can be gotten off, or what injury she has sustained or may sustain in her then situation; and the other rule cannot be applied to such a case. But the adoption of such a principle in other cases, where the vessel is safely moored in a regular port, would probably have the effect here, as it has already had in England, of compelling underwriters to insert a stipulation in the policy that there shall be no abandonment except in case of capture or detention, or where the vessel is stranded." In Moss *v.* Smith, 9 C. B. 94, the freight of the vessel was insured on a certain voyage, and at an intermediate port the vessel having been damaged, was sold. The expense of repairs would not have been equal to the value

mode or terms of sale, must depend principally on the fact whether the master was the agent of the owner of the property insured, or of the underwriter at the time of the sale. The insurers are not to be made liable for, or by his acts, unless he has acted within his duty, authority, and discretion, whether these belong to him as master, or are created and conferred by extraordinary circumstances. And the question of a sufficient necessity, is a question for the jury, under the direction of the court.

We shall consider hereafter, the effect of the purchase by the master of the vessel when sold, on the right of abandonment of the owners.[1]

The report of the surveyors, is a document of much weight and importance, but is not conclusive as evidence.[2] The decree

of the vessel when repaired, but would have exceeded the value of the freight. It was held, under these circumstances, that the owner was bound to repair the vessel and earn the freight. It was contended that if a prudent owner looking at the amount of freight would not have repaired the vessel, there was a total loss of freight. But this doctrine was controverted, and *Maule*, J., said: "The ordinary measure of prudence which the courts have adopted is this, if the ship when repaired, will not be worth the sum which it would be necessary to expend upon her, the repairs are, practically speaking, impossible, and it is a case of total loss." See also, Rosetto *v.* Gurney, 11 C. B. 176, 7 Eng. L. & Eq. 461, 466. So, in Reimer *v.* Ringrose, 6 Exch. 263, 4 Eng. L. & Eq. 388, where corn, which was insured free from average, was sold at an intermediate port on account of being damaged, *Alderson*, B., said: "But there was another point made at *nisi prius*, and which was whether or not it was a total loss in case a party uninsured would have conducted himself as a reasonable man in the way in which the plaintiff had conducted himself; that is to say, instead of bringing home the corn in a damaged state, and putting himself to expense in so doing, selling it and receiving the money. Now I, at that time, was of the opinion, and am so still, and I believe the court entirely concur with me, that that was not a proper view of the case to be left to the jury at all, but that the real question to be left to the jury would have been, whether or not the corn was in that state that, if brought home, it could have been sold for an amount exceeding the expense of bringing it home." And in Navone *v.* Haddon, 9 C. B. 30, where goods insured free from average were sold at an intermediate port, and the jury found that a prudent uninsured owner would have adopted this course, it was held that as they could at a reasonable expense have been put in a condition to be brought home by another vessel, the underwriters were not liable. *Maule*, J., said: "A partial loss cannot be turned into a total loss, because those who have the control over the goods, may act prudently in selling them at an intermediate port, rather than incur the expense of cleansing and reshipping them. It may be that a prudent owner uninsured, would not have thought it worth his while to carry these goods further, but would have left them behind; still that alone would not make the loss total."

[1] See post, section 8, on Revocation of Abandonment.

[2] Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. 249, 264; Prince *v.* Ocean Ins. Co., 40 Maine, 481.

of a court of admiralty is, in general, conclusive, although open to some inquiries, as to fraud and the like.[1] But if a vessel is ordered to be sold under such a decree to pay salvage, and the owner has an opportunity to pay the salvage and discharge the lien, he is so far bound to do this, that if he does not, the sale will be regarded as made by him voluntarily, and as not giving a claim for a total loss.[2] And if a ship be sold under a decree of condemnation as prize and the owner buys it, or adopts a purchase of it by the master, the vessel is considered as not having passed away from him, but the price he pays, with costs and charges, is the measure of his loss;[3] and so it would be in a case of compromise with captors, or ransom from them.[4]

SECTION III

OF ABANDONMENT OF THE CARGO.

Goods are totally lost if destroyed by a peril insured against; or if injured to such an extent and in such way as to make them of little or no value for the purpose for which they were intended; or if the voyage upon which the insurance on the goods is made, is entirely broken up.[5] But if the voyage is broken up, merely for the season, as where the vessel at an inter-

[1] See post, Chapter XV.

[2] Thorneley *v.* Hebson, 2 B. & Ald. 513. But, generally, if the vessel is sold to pay salvage, the loss is total. Williams *v.* Suffolk Ins. Co., 3 Sumner, 510. And, as salvage expenses are to be computed in making up a total loss, Bradlie *v.* Maryland Ins. Co., 12 Pet. 378, 400, it follows, that if they amounted to more than half the value of the vessel, the assured would not be obliged to pay the salvage to prevent the sale, but might abandon and claim a total loss. See Holdsworth *v.* Wise, 7 B. & C. 794.

[3] See post, § 8.

[4] See post, § 8.

[5] In Manning *v.* Newnham, 3 Doug. 130, the ship was sold on account of sea damage at an intermediate port, and the cargo, which was but little injured was also sold, there being no ship there to bring it on. Held, that the assured could abandon as for a total loss. This doctrine was assented to, but the point was not decided in Wilson *v.* Royal Exch. Ass. Co., 2 Camp. 623, 625, per Lord *Ellenborough*, C. J.

mediate port requires extensive repairs,[1] or where the ship is lost, but the goods are saved, and a delay of months ensues, while waiting for means of forwarding them, the insured cannot abandon.[2]

The fifty per cent. rule applies to the cargo, as well, and in the same way as to the ship.[3] But in respect to the cargo, as in respect to the ship, if there be a loss not actually total, but one which might be made constructively total, whatever remaining interest or property, or claim on account of the subject-matter of insurance, the owner may have, must be transferred by him by abandonment to the insurers. And a general abandonment has here also, as in respect to the ship, the full effect of an universal transfer and cession.

[1] Anderson *v.* Wallis, 2 M. & S. 240. See also, Ruckman *v.* Merchants' Louisville Ins. Co., 5 Duer, 342, 365.

[2] Hunt *v.* Royal Exch. Ass. Co., 5 M. & S. 47. The case of Hudson *v.* Harrison, 3 Brod. & B. 97, which is sometimes cited as adverse to the doctrine of the text, was decided expressly on the ground, that the underwriters had by their acts accepted the abandonment, before the goods could have been forwarded. In Dixon *v.* Reid, 5 B. & Ald. 597, the ship and cargo were barratrously taken out of the course by the crew, and the ship and a part of her cargo sold, and the rest sent on in another vessel. The loss was held to be total. *Abbott*, C. J., said: "The case is plainly distinguishable from all the cases which have been cited in argument, where the ship has been driven out of her course by the perils of the sea, and the voyage thereby retarded. In those cases, the cargo was, during the whole time, in the possession of the assured. Here, by the fraud and barratry of the master and mariners, the cargo was taken out of the possession of the assured. From that time it became to them a total loss." The distinction taken in this case, between the forwarding of the cargo by the master, and by an unauthorized person, does not appear to be founded on correct principles. All that the insurer warrants is, that the cargo shall arrive at the port of destination uninjured by the perils of the sea. He does not warrant that any particular person shall bring it on, but merely that it shall arrive.

[3] Gardiner *v.* Smith, 1 Johns. Cas. 141; Gilfert *v.* Hallet, 2 Johns. Cas. 296. In Moses *v.* Col. Ins. Co., 6 Johns. 219, insurance was effected on three hundred barrels of flour from New York to London. On the way, one hundred and twenty-three were thrown overboard and thirty were sold through necessity, and the rest were sent on and delivered. The value of those sold and those thrown overboard together amounted to more than one half the value of the whole, but deducting the amount which those sold brought at the sale, the loss did not amount to fifty per cent. The court held, that the plaintiff was entitled to recover. *Van Ness*, J., said: "The insurer undertook that the whole of the article insured should arrive at the port of destination; and the assured have nothing to do with the money for which the damaged goods were sold. The sale became necessary by reason of an injury to the flour for which the insurers are liable, and the proceeds of the sale, passed by the abandonment to the insurers." We are somewhat inclined, however, to doubt this decision.

As there may be a total loss of the cargo, but not of the ship, so there may be a total loss of the ship and not of the cargo. For if the vessel is wrecked, or otherwise taken from the possession of the master, and it is in his power to take the cargo from the ship and send it forward to the place to which it was originally shipped, it is his duty to do so. The power and duty of the master in this respect, and the rights and obligations of the owner, the shipper and the master which depend upon this duty, form an interesting topic in the Law of Shipping, and are there fully considered.[1] Here we shall give but the general principles of so much of the law in this respect, as belongs to the Law of Insurance.

In the first place, it is the duty of the master to transship the goods, or send them on, even by land carriage, if he can with reasonable endeavors; if he fail to do this and a total loss ensues, this is a loss by the misconduct of the master, and if the insurers have insured against that, they are answerable. But the shippers have a right to look to the owner for compensation for damage sustained by the wrong doing of the master; and this right or claim passes to the insurers by abandonment.

Generally, if the master could have transshipped the goods, and did not, the shipper cannot abandon as for a total loss.[2] And if a part only be saved in a condition to be transshipped, or forwarded, whether it will be the duty of the master to do so, must depend upon the quantity and value of what is saved, and the facilities for forwarding it, and the probability of its perishing or greatly deteriorating on the way;[3] as he would not be bound to discharge this duty where it was of no practical benefit, or would be to the detriment of the parties concerned.

As the goods may be abandoned as for a total loss, if the voyage is broken up, so if there be many shipments for divers ports, and the ship is prevented, by a peril insured against, from landing a certain shipment at a certain port, that shipment may

[1] See Rugely v. Sun Mutual Ins. Co., 7 La. Ann. 279, and Vol. I., p. 158–173.

[2] See Wilson v. Royal Exch. Ass. Co., 2 Camp. 623; Ludlow v. Col. Ins. Co., 1 Johns. 335, and cases in Vol. I., p. 158–173.

[3] Hudson v. Harrison, 3 Brod. & B. 97.

be abandoned, although the vessel goes on and reaches the other ports and delivers the cargo in safety.[1]

If the vessel is wrecked at a distance from any market, and the goods are taken out and carried to a market and there sold, under circumstances which render the sale valid, the expenses of transporting the goods, and of the sale, are to be deducted from the gross proceeds of the sale to determine whether the loss has exceeded fifty per cent.[2]

If the goods insured remain in specie, but so injured that they cannot be carried with safety, or any hope of their arriving in a merchantable condition, to their destined port, it is the duty of the master as well as his right, to do the best he can with them at any intermediate port. If they are of any value, he should obtain this by a sale, and then the shippers may claim for a total loss, transferring the proceeds by abandonment.[3] This rule would apply, whatever be the cause of the injury, as a leak, or submersion, or a sudden shock by striking a shoal or rock, if the peril be insured against. But if the goods perish by natural decay or intrinsic defect, this is, of course, not at the risk of the insurers.[4]

If goods are jettisoned, the shipper may demand contribution from the interests saved by the sacrifice, and then claim the balance, or he may, at his own discretion, demand from the insurers for the whole loss, and transfer to them by abandonment his claims for contribution. If, therefore, the jettison amounts to sixty per cent., he may claim as for a total loss, although he transfers by abandonment a claim for contribution amounting to twenty per cent.; but if he claims and receives the twenty per cent. from the contributing parties, his loss becomes less than one half, and cannot be made total by abandonment.[5]

[1] In Akin *v.* Mississippi Marine & F. Ins. Co., 16 Mart. La. 661, goods were insured from New Orleans to Key West and Havana. When near Key West, the vessel encountered a gale, in which a considerable part of the cargo was damaged, and the captain thought it necessary to go to Havana, where the cargo was sold. It was held, that the loss was total, because the voyage to Key West had been lost.

[2] Kettell *v.* Alliance Ins. Co., Sup. Jud. Ct. Mass., Nov. T. 1857.

[3] See cases ante, Vol. I. p. 161, n. 3.

[4] See ante, p. 216, n. 2 and 3.

[5] See post, Chapter XI.

Generally, where goods are jettisoned, the claim against the insurers is the same as if they had been lost by the peril from which the jettison saves the remainder. And jettison is usually specifically insured against.[1]

If there be a capture, or other detention insured against, and a restoration, there still may be an abandonment thereafter if the damage by the delay or hinderance works a damage of more than fifty per cent., or breaks up the voyage; but not otherwise.[2] A capture gives the right of immediate abandonment;[3] but any detention which may be rationally expected to last but a short time, gives no right to abandon; but if it appears to be permanent, and to amount to a destruction of the voyage, or a taking the property permanently from the control of the master, it justifies an abandonment.[4]

If the ship be released from capture by a compromise which takes from the insured more than half the value of the property insured, this gives a ground for a constructive total loss.[5]

The rule in case of a sale by the master is the same in relation to the cargo, that it is in relation to the ship; the master must not sell unless the sale be strictly necessary; then he may sell; and the owner, being so dispossessed of his property, may abandon it, always provided that the necessity for the sale springs from a peril insured against.[6] And if an agent of the

[1] See Judah *v.* Randal, 2 Caines, Cas. 324, and cases cited post, Chapter XI.

[2] Dorr *v.* New England Marine Ins. Co., 4 Mass. 221. In this case, the vessel and goods were captured and restored. The goods were delivered to a person who represented himself as the agent of the owner, on condition that he should pay a certain proportion of the expenses, and give security to pay the freight to the captain. This was on the 22d of the month. The owner hearing of the capture, abandoned on the 18th. The former master refused to take the goods on, and they were shipped by the person to whom they had been delivered, on board another vessel on the 28th of the following month, and they finally arrived at the port of destination, where they were sold and the proceeds held for whom it might concern. The court held, that the plaintiff was entitled to recover as for a total loss.

[3] See cases ante, p. 246–281.

[4] See cases ante, p. 246–281.

[5] Vandenheuvel *v.* United Ins. Co., 1 Johns. 406; Clarkson *v.* Phœnix Ins. Co., 9 Johns. 1. In Waddell *v.* Columbian Ins. Co., 10 Johns. 61, the compromise was made by the master, who was also a part-owner, agreeing to relinquish all claim to the vessel and cargo on payment of a certain sum by the captors. Held, that the compromise being *bonâ fide* and for the best interest of all concerned, the master could recover on a policy insuring his interest as part-owner.

[6] See ante, Vol. I. p. 161, n. 3; Page *v.* Western M. & F. Ins. Co., 19 La. 49;

owners, invests the proceeds of the cargo sold for the purpose of remittance, this does not affect the abandonment.[1] But this right of sale of the cargo does not exist so as to render the underwriters on the cargo liable, if the cargo is sold, not on account of damage done to it by a peril of the sea, but to pay for repairs to the vessel.[2]

As the master may sell, so he may hypothecate; and if the purpose of the master is to raise funds, and he can hypothecate, he should do so rather than sell, unless the terms demanded would make the transaction certainly injurious to the shipper. And the purchaser at the sale, or the lender upon hypothecation, must use reasonable precautions to satisfy himself that the sale or pledge is necessary; otherwise the transaction is void; but after this care, the buyer or lender is not responsible for any use or abuse of the funds by the master.[3] Such a loan on hypothecation does not constitute a total loss; because the shipper has his remedy against the owners of the ship.[4] The ques-

Vaughan *v.* Western M. & F. Ins. Co., 19 La. 54; Caldwell *v.* Western M. & F. Ins. Co., 19 La. 42; Rugely *v.* Sun Mut. Ins. Co. of N. Y., 7 La. Ann. 279. In Underwood *v.* Robertson, 4 Camp. 138, goods were insured at and from London to Demerara. The ship was captured near the port of destination, plundered of her stores and the whole crew except the captain and a boy, taken out. She was afterwards recaptured and carried into St. Thomas, where she was sold by the master under an order of the admiralty court, obtained by him for that purpose. The master testified that he could not procure a crew of any sort to carry the ship from St. Thomas to Demerara, and that without selling the cargo, he could not pay the salvage. Under these circumstances the insured claimed a right to abandon and recover as for a total loss. Lord *Ellenborough* held that if the master could not have procured a crew at once, he should have waited a reasonable time for that purpose, and that it did not appear, even if the ship insured could not have proceeded, but that the goods could have been forwarded in other vessels. In regard to the sale to pay salvage, Lord *Ellenborough* said: "He was bound to have tried, and to have tried seriously and deliberately, every other expedient to raise money before disposing of any part of the goods intrusted to his care. It does not satisfactorily appear that he might not have raised the money by drawing on his owners, or by hypothecating the ship. The sale of the cargo was only to be resorted to in the last extremity, when every other expedient had failed, and every other resource was hopeless."

[1] Pacific Ins. Co. *v.* Catlett, 4 Wend. 75, 1 Wend. 561; Catlett *v.* Pacific Ins. Co., 1 Paine, C. C. 594.

[2] See cases ante, p. 261, n. 2.

[3] See ante, Vol. I. p. 418, n. 4; p. 419, n 4.

[4] See ante, Vol. I. p. 406–440.

tion for the insurers, in a case of *respondentia* or hypothecation of the goods or bottomry of the ship, is, what is the whole amount, of expense and interest, actually lost.[1]

If goods hypothecated or pledged on *respondentia* are sold to pay the debt, this may be a total loss, if the shipper had no opportunity to liberate the goods and prevent the sale. But if he had such opportunity and did not profit by it, he cannot, merely by reason of the sale, claim as for a total loss. And if his expense and the amount of his actual loss, is increased by his own neglect or fault, the insurers may charge to him all that increase.[2]

The rule of fifty per cent. does not, in our opinion, apply if any substantial part of the goods insured arrives in safety at its destined port. Thus, if in the course of the voyage, the ship be stranded, and relieved by jettison of eighty per cent. of a shipment, and the remaining twenty per cent. arrives in safety, there can be no converting of this partial loss into a total loss by abandonment, whether the contribution due would amount to more than thirty per cent., or less. Nor can a loss of a part of the goods at the port of destination, be made a constructive total loss by abandonment, however large that part may be.[3]

[1] Fontaine *v.* Columbian Ins. Co., 9 Johns. 29.

[2] The same rule would probably be adopted here as in the case of a bottomry bond, where it is held that the underwriters are not bound to furnish money to take up the bond, and are not therefore liable if the ship is sold through the neglect of the owners to pay the same. Bradlie *v.* Maryland Ins. Co., 12 Pet. 378.

[3] In Forbes *v.* Manufacturers' Ins. Co., 1 Gray, 371, *Dewey*, J., said: "The court are of opinion, that after any considerable portion of the goods insured, as in the present instance thirty-eight per cent. of the whole amount of the number of boxes of teas, has arrived at the port of destination, and been landed in a perfect state, the assured cannot then abandon and recover for a total loss, upon the ground of the loss of more than fifty per cent. at some former period of the voyage." This case arose from the loss of property on board the Paul Jones. This loss was very great, and it involved many questions and many parties in Boston and in New York; and all of the questions were referred, by nearly all the parties, to Professor Greenleaf of the Cambridge Law School, the Hon. Franklin Dexter, of Boston, and the author of this work. The case was thoroughly argued in writing by able counsel, and the referees came unanimously to the conclusion expressed in the text, and were sustained, on this point, by the case of Forbes *v.* Manufacturers' Ins. Co. See also, Seton *v.* Delaware Ins. Co., 2 Wash. C. C. 175. But no notice appears to have been taken of this rule in the case of Moses *v.* Columbian Ins. Co., 6 Johns. 219, cited ante, p. 371, n. 3.

If a cargo be insured consisting in part of memorandum articles, and in part of other goods, no abandonment for a mere deterioration in value is valid, unless the deterioration in value of the articles not within the memorandum, exceeds one half the value of all the goods insured.[1]

The general rules of law applicable to Memorandum Articles we have already considered somewhat at length; it remains, however, to determine (assuming that the underwriters are not liable for a constructive total loss), what amounts to an actual total loss. This subject is generally divided into two parts, loss at an intermediate port, and loss at the port of destination, and we shall so treat of it here. And as the law is somewhat different in England and in this country, we shall consider the authorities of the two countries separately.

A. *Of the English Doctrine of Loss at the Port of Destination.*

According to the earlier English doctrine, as laid down by Lord *Mansfield*, if the subject-matter insured arrived at the port of destination existing in specie, though utterly worthless for all purposes for which such an article was ordinarily used, the underwriters were not liable.[2] But later English cases seem to proceed on the principle that the goods must be of some value on arrival, and that it is not sufficient that they exist merely in specie. We are not aware that this point has been expressly so decided, but it seems to be implied in the cases to which we are about to refer.

[1] Marcardier *v.* Chesapeake Ins. Co., 8 Cranch, 39.

[2] Thus Lord *Mansfield* in the early case of Cocking *v.* Fraser, Park, Ins. 151, Marsh. Ins. 227, said: "The fish may all come to port; though from the nature of the commodity, it may be damaged, it may be stinking, still, as the commodity *specifically* remains, the underwriter is discharged." This was however a case of loss at an intermediate port, and we shall have occasion to refer to it in that connection hereafter, but if this is the correct rule to determine the question of loss at an intermediate, it would apply *a fortiori* to a loss at the port of final destination. And in Mason *v.* Skurray, Park on Ins. 160, Marshall on Ins. 226, it was held, where a cargo of peas arrived at the port of destination, so much damaged that it was not worth one fourth of the freight, the underwriters were not liable. See also, Glennie *v.* London Ass. Co., 2 M. & S. 371; M'Andrews *v.* Vaughan, Park on Ins. 155, Marsh. on Ins. 233.

B. *Of the English Doctrine of Loss at an Intermediate Port.*

The principles which we have already considered relative to the duty of the master to forward goods from an intermediate port to the port of destination, apply with still greater force to memorandum articles. If the underwriters are not liable if the goods finally arrive in specie, it would follow that it is the duty of the master if possible to effect that object by carrying them on. But if they must be of value on arrival, then to determine whether they should be carried on, the expense of so doing must be taken into consideration. As long as the rule of an existence in specie at the port of destination prevailed, the underwriter was not liable, if the voyage was broken up at the intermediate port, merely because the goods were not worth bringing on.[1] This doctrine was attacked at various times by different judges, but was not distinctly overruled till within a compara-

[1] Cocking *v.* Fraser, Park on Ins. 151, Marsh. on Ins. 227, is one of the earliest cases on this subject. The vessel, loaded with fish, was bound to Figara in Portugal, and put into Lisbon in distress. The fish were of no value, and the voyage was therefore broken up, though the ship might have proceeded to her port of destination with the cargo. This was held not to be a total loss. Dyson *v.* Rowcroft, 3 B. & P. 474, is sometimes referred to as contravening the doctrine of Cocking *v.* Fraser, but an examination of the facts of the case will show that the cases are entirely consistent. The ship put into an intermediate port so much damaged that repairs were necessary to enable her to proceed on her voyage. To make these repairs it was necessary to unlade the cargo. But the cargo was so much damaged that it was injurious to the health of the crew, and the government refused to allow it to be landed. It was therefore thrown overboard. This was held to be a total loss. So, in Cologan *v.* London Ass. Co., 5 M. & S. 447, where the vessel was captured, and recaptured and sent into Bermuda, but was not allowed to proceed to her port of destination, and the cargo was therefore sold, it was held to be a total loss. In Anderson *v.* Royal Exch. Ass. Co., 7 East, 38, the vessel was under water for more than a month. The cargo was then recovered, and kiln-dried, but not sent on, although it might have been. The court held that if the abandonment had been made while the goods were under water, there would have been a total loss, but otherwise, not. In Parry *v.* Aberdein, 9 B. & C. 411, the goods were so much damaged at the intermediate port, that they would have been worthless on arrival, and no ship could be obtained to take the goods on. This was held to be a total loss. See also, Gernon *v.* Royal Exch. Ass. Co., 6 Taunt. 883. In Thompson *v.* Royal Exch. Ass. Co., 16 East, 214; and in Hedburg *v.* Pearson, 7 Taunt. 154, it did not appear but what the cargoes might have been taken on. The underwriters were held not to be liable.

tively recent period. The present rule of the English courts is stated with so much clearness by Lord *Abinger*, C. B., in the leading case on this subject,[1] that we are disposed to give it in his own words: "If the goods are of an imperishable nature, if the assured become possessed, or can have the control of them, if they have still an opportunity of sending them to their destination, the mere retardation of their arrival at their original port may be of no prejudice to them beyond the expense of reshipment in another vessel. In such a case, the loss can be but a partial loss, and must be so deemed, even though the assured should, for some real or supposed advantage to themselves, elect to sell the goods where they have been landed, instead of taking measures to transmit them to their original destination. But if the goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the species be not utterly destroyed, that they cannot with safety be reshipped into the same or any other vessel; if it be certain that, before the termination of the original voyage, the species itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers not under the control of the assured; if, by any circumstance, over which he has no control, they can never, or within no assignable period, be brought to their original destination; in any of these cases the circumstance of their existing in specie at that forced termination of the risk, is of no importance. The loss is, in its nature, total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle."

It then becomes the duty of the master to send on the goods only when they can be of value on arrival. But it is obvious

[1] Roux *v.* Salvador, 3 Bing. N. C. 266, which we have had frequent occasion to mention, is an important case on this point. A cargo of hides was insured free of average on a voyage from Valparaiso to Bourdeaux. The ship put into Rio Janeiro in distress. The hides were in a state of incipient putridity, and it was impossible to take them to Bourdeaux, because they would have become entirely rotten, and would have lost the character of hides before they arrived. They were therefore sold. And it was held that the underwriters were liable.

that the master is not obliged to incur every expense, however great, to effect this object; and the question soon arose as to what was his duty in this respect. At first, the court laid down the rule cautiously, but not very definitely, and held that if the goods could be sent on in a reasonable time and at a reasonable expense, the master was bound to do it.[1] The inconvenience of having a rule dependent upon what the jury might in each case find to be a reasonable time and a reasonable expense, being very great, the courts established a rule which is practical, and can be applied to the generality of cases with the same result. It is this. All the expenses at the intermediate port are to be added to the extra freight, if the transit cannot be effected at the same rate of freight, and if this exceeds the value of the goods on arrival, the loss is total; if not, it is partial only.[2]

[1] Navone *v.* Haddon, 9 C. B. 30. The vessel in this case put into an intermediate port in distress. Part of the cargo, which consisted of bales of waste silk, was sold on account of damage, the rest arrived at the port of destination. The court seem to have acted on the supposition that if some of the bales were totally destroyed, the insured might recover for them (a question we have already considered), and it became important therefore to consider the condition of the bales which were sold. And being of the opinion that a reasonable expense would have enabled the master within a reasonable time to have dried the goods, and forwarded them, the court held that the loss was not total.

[2] In Reimer *v.* Ringrose, 6 Exch. 263, 4 Eng. L. & Eq. 388, the cargo, consisting of corn, was taken out at an intermediate port, in order that the ship might be repaired, and being found to be much damaged, was sold. The jury found that the corn might by the exercise of reasonable and proper care, have been brought home and sold as damaged corn. And the court held that as the expenses of bringing it home did not exceed the value when brought home, the loss was not total. In the subsequent case of Rosetto *v.* Gurney, 11 C. B. 176, 7 Eng. L. & Eq. 461, the vessel sailed from Odessa with a cargo of wheat on board, bound for Liverpool. She was stranded near Odessa, and to obtain funds for repairs a bottomry bond was given. When the vessel arrived near the Cove of Cork, it became necessary to run her ashore. She was afterwards towed into the Cove of Cork, and salvage claimed. The vessel and part of the cargo was sold by order of the Admiralty Court, and the proceeds divided between the salvors and the holders of the bottomry bond. The jury found that the cargo was much damaged, but might have been dried and carried on, at a reasonable expense, and also that it would not have been prudent for an uninsured owner to have entered into a controversy with the salvors, and the holder of the bottomry bond in the Court of Admiralty. By direction of the court, the jury found for the plaintiff. On a motion for a new trial the court said: "The question to be submitted to the jury will be, was it 'practicable' to send the whole or any part of the cargo to its place of destination, Liverpool, in a marketable state? To determine this

C. *Of the American Doctrine of Loss at the port of Destination.*

The rule in this country on this subject was early established, at the time when the case of Cocking *v.* Fraser,[1] was recognized as an authority in England. It is, therefore, well settled that if the goods insured arrive at the port of destination existing in specie, the underwriters are not liable, although they are of no value whatever.[2] Some question has arisen as to the meaning of the word specie. The primitive meaning of the word is, undoubtedly, *appearance*, and it is in this sense, that it is commonly

question, the jury must ascertain the cost of unshipping the cargo, the cost of transshipping it into a new bottom, the cost of drying and warehousing it, and the cost of the difference of the transit, if it can only be effected at a higher sum than the original rate of freight. Add to these items the salvage allowed in proportion to the value of the cargo saved, and the loss will be total, if the aggregate exceed the value of the cargo when delivered at Liverpool, the port of discharge; but if the aggregate do not so exceed the value of the cargo, or of that part of it saved, the loss will be partial only."

[1] Park, Ins. 151, Marsh. Ins. 227.

[2] In Morean *v.* United States Ins. Co., 1 Wheat. 219, 3 Wash. C. C. 256, memorandum articles were insured on a voyage from Cape Henry to Lisbon. The vessel was wrecked within the port of Lisbon, and part of the cargo carried to that city and there sold. Mr. Justice *Washington* said: "If the property arrive at the port of discharge, reduced in quantity or value to any amount, the loss cannot be said to be total in reality, and the insured cannot treat it as a total, and demand an indemnity for a partial loss. The only question that can possibly arise, in relation to memorandum articles, is, whether the loss was total or not; and this can never happen where the cargo, or a part of it, has been sent on by the insured, and reaches its original port of destination." See also, Brooke *v.* La. State Ins. Co., 16 Mart. La. 640, 681, 17 id. 530; Skinner *v.* Western Marine & F. Ins. Co., 19 La. 273.

In Robinson *v.* Commonwealth Ins. Co., 3 Sumner, 220, 224, Mr. Justice *Story* said: "If the schooner had arrived at the port of destination, with the cargo on board, physically in existence, the plaintiff would not have been entitled to recover, however great the damage might have been by a peril insured against, even if it had been ninety-nine per cent., or in truth *even if the cargo had there been of no real value.*" Nor does this doctrine conflict with the case of Williams *v.* Cole, 16 Maine, 207, as has been sometimes supposed. This was a case of insurance upon a cargo of potatoes from Frankfort to Baltimore. The policy contained a clause that certain articles, together with such as are esteemed perishable in their own nature, were warranted free from average, unless it amounted to seven per cent. On the arrival of the vessel at Baltimore, the hatches were opened and the potatoes were found to be entirely rotten. The mayor of the city ordered the cargo to be carried below the fort, and to be thrown overboard. This was held to be a total loss, on the ground that the cargo existed merely as a nuisance, but it must also be remembered that under the policy, the underwriters were answerable for a loss equal to seven per cent.

applied to memorandum articles. Thus, if the box of a chariot is lost and nothing but the wheels remain, these cannot be said to have the appearance of a chariot, and consequently, the article no longer exists in specie, and the underwriters are liable as for a total loss with salvage.[1] But it has been held, that the value of the article has nothing to do with its existence in specie. Thus, fish, though absolutely spoiled,[2] and corn which was putrid,[3] were both held to exist in specie. And pork has been held not to lose its identity by being roasted.[4]

D. *Of the American Doctrine of Loss at an Intermediate port.*

By far the most difficult questions on this subject have arisen, in determining what is a total loss at an intermediate port. We shall here consider the law only as determined by the American authorities generally, for if the fifty per cent. rule applies to any kind of memorandum articles, as has been held in Massachusetts,[5] they will be governed by the same rules as are applicable to other goods, and need not be considered here.

In New York, the *dictum* of Lord *Mansfield* in Cocking *v.* Fraser,[6] has been followed to its fullest extent, and the rule in that State is, that if the goods exist in specie at the intermediate port, the insured is not entitled to recover. It is true, that in some of the cases in that State, there were facts which clearly showed that the loss was not total, and that the goods could

[1] Judah *v.* Randal, 2 Caines, Cas. 324.

[2] Cocking *v.* Fraser, Park, Ins. 151, Marsh. Ins. 227.

[3] Neilson *v.* Columbian Ins. Co., 3 Caines, 108.

[4] Skinner *v.* Western Marine & F. Ins. Co., 19 La. 273. The action was on a valued policy on pork in bulk, beans, and flour, valued at $3,480. The risk was to continue until the flat boat, in which the cargo was shipped, was landed safely in the port of New Orleans. On the way, the boat took fire about nine miles above the city, and was burned to the water's edge. The bottom, however, floated down to New Orleans with some of the pork on board in a damaged, barbecued condition. The quantity thus saved, was 7,723 pounds. It was represented by the port-wardens, as damaged more or less by fire, and unmerchantable, and it was sold at the rate of 2¾ cents per pound. This was held not to be a total loss, on the ground that roasted pork was still pork.

[5] Kettell *v.* Alliance Ins. Co., Sup. Jud. Ct., Mass., March T., 1858, cited ante, p. 338, n. 2.

[6] Park, Ins. 151, Marsh. Ins. 227.

have been carried on, so as to arrive in specie. But these cases were decided on the ground that the goods existed in specie; and there are also other cases, which are not only inconsistent with the English rule, but also with that laid down in many American cases.[1]

But the doctrine, that if the goods exist in specie at the intermediate port there is no total loss, is not founded on principle; for the insurers guarantee that the goods shall arrive at the port of final destination in specie, and if, therefore, owing to the perils insured against, they cannot be carried forward so as to arrive in specie, the underwriters should be liable, notwithstanding the goods exist in specie at the intermediate port.[2] And if the

[1] Thus, in Maggrath *v.* Church, 1 Caines, 196, the cargo, consisting of corn, was found at an intermediate port to be entirely unmerchantable, and unfit to be reshipped, yet the loss was held not to be total. In Depeyster *v.* Sun Mutual Ins. Co., 17 Barb. 306, the vessel put into an intermediate port, with a cargo of hides in a putrefying condition. It being thought impossible to carry the hides to the port of destination, they were sold; and it was held, that as they existed in specie, the loss was not total. See also, Neilson *v.* Col. Ins. Co., 3 Caines, 108; Saltus *v.* Ocean Ins. Co., 14 Johns. 138. In Bryan *v.* New York Ins. Co., 25 Wend. 617, 1,970 barrels of corn were insured on a voyage from Windsor, N. C., to New York. The vessel was wrecked on Beacon Island Shoals. The chance of recovering the corn was sold to different persons in lots, at a trifling sum per barrel. The risk and expense were so great, that some preferred to lose the money they had already spent, rather than to endeavor to recover any of the corn. Only twenty-seven barrels were saved. This was held to be a total loss, and Mr. Justice *Nelson* said: "It was in fact total, as much so, as if the cargo had gone to the bottom of the sea; upon every reasonable calculation, the amount saved was by mere accident and chance."

[2] It was held, in Aranzamendi *v.* Louisiana Ins. Co., 2 La. 432, that if a damaged cargo is sold at an intermediate port, this is not a total loss, unless the goods were in such a condition that they could not have been carried on. What may, perhaps, be considered the true doctrine, was laid down in Williams *v.* Kennebec Mutual Ins. Co., 31 Maine, 455. It was held, that if the article was in such a condition at the intermediate port, that by the exercise of reasonable diligence and care, it could be carried to the port of final destination, so as to reach there in specie, although it might be worthless, the loss would be but partial, but otherwise, if it would not arrive in specie. In Poole *v.* Protection Ins. Co., 14 Conn. 47, insurance was effected on 280 hides, from Mobile to New York. The vessel was wrecked near Nassau, and the hides were under water for more than a week. They were then recovered, taken to Nassau, and sold by the salvors. They were never in the possession of the assured or their agents. The court held that the loss was total. The case was probably correctly decided on all its facts, but there are many *dicta* in it, which do not seem to us to be correct.

In Robinson *v.* Commonwealth Ins. Co., 3 Sumner, 220, the vessel was wrecked at an intermediate port; the cargo consisted of potatoes, which were nearly all rotten, or so much injured as to be of little value. There was but one vessel in port, capable of taking on the cargo, and that vessel had a cargo on board, and was bound on another

goods are in such a condition at the intermediate port, that they cannot be carried forward consistently with the health of the crew and the safety of the vessel, the loss is considered as total.[1]

voyage. *Story*, J., held that it was an insurance on the cargo for the voyage; and if, by reason of the perils insured against, the cargo was permanently prevented from arriving at the port of destination, that constituted a total loss, for which the insured was entitled to recover upon a policy like the present. And it was held, that in determining whether there was a loss at the intermediate port, the jury should find: "1. Whether the vessel could have been repaired at all, or at a cost not exceeding half her value, after the repairs were made in a reasonable time to carry on the cargo to the port of destination. 2. Whether, if she could be repaired for less than the half value, she could have been repaired before the cargo would have been so deteriorated, as to have lost all value, or to have been totally destroyed. 3. Whether, if the vessel were not so repairable, another vessel could have been procured to carry on the cargo to the port of destination, *in its then damaged state.*"

The case of Hugg *v.* Augusta Ins. & Banking Co., 7 How. 595, is an important one on this subject. The insurance was on the freight of the vessel at and from Baltimore to Rio Janeiro, and back to Havana and Matanzas. The policy contained the usual memorandum clause. About four hundred tons of jerked beef were shipped to be delivered at Matanzas. The vessel was obliged to put into Nassau, where the cargo was found to be so much damaged, that the board of health refused to allow but about one hundred and fifty tons to be landed. This portion was wet and heated, and not in a fit condition to be shipped. The vessel could not have been repaired, except at an expense exceeding half her value, so as to have carried the cargo to the port of destination, and there was no vessel in port which could have been procured to take it on. This fact is so stated in the statement of the case on page 596, but Mr. Justice *Nelson*, in delivering the opinion of the court, says on page 605, that the point certified to the court assumes, that the ship was capable of carrying on the cargo, and that the only question was, whether the cargo was so much damaged as to have dispensed with that duty. It was held, that if the repairing of the vessel or the procurement of another, would necessarily have produced such a retardation of the voyage as would in all probability, have occasioned a destruction of the article in specie, before it could have arrived at the port of destination, or if, from its damaged condition, it could not have been reshipped in time consistently with the health of the crew or safety of the vessel, or if it would not have been in a fit condition from pestilential effluvia, or otherwise, to have been carried on, it then was the duty of the master to sell the goods for the benefit of whom it might concern. It was also held, that unless another vessel could have been procured at an expense not exceeding the amount of the freight to be earned by completing the voyage, the underwriter on freight would have had no right to insist upon this duty of the master.

In Tudor *v.* New England Mutual Ins. Co., 16 Law Reporter, 464, insurance was effected on a cargo of ice, a memorandum article. The vessel put into an intermediate port, and it was found that it would be necessary to unpack the ice, in order to repair the vessel, and that it was so much melted, that the whole of it would be gone before the vessel could be repaired, so that it could be reshipped. Held, that there was a total loss of the ice.

[1] Hugg *v.* Augusta Ins. & Banking Co., 7 How. 595; Williams *v.* Kennebec Mutual Ins. Co., 31 Maine, 455; Poole *v.* Protection Ins. Co., 14 Conn. 47.

From the examination of the authorities which we have made in our notes, it is apparent that no case in this country distinctly decides the question, whether, in case the goods are in such a condition at the intermediate port, that the cost of unloading them, drying them if necessary, and the increased freight for sending them on, would exceed the value on arrival, the loss is total. The expenses may be separated into two classes.

First, those incident to the delay at the intermediate port, such as the unloading and reloading of the goods and all the expenses incurred to render them fit for reshipment.

Second, the increased freight, if any.

And, admitting that all these are properly chargeable to the underwriters on the memorandum articles, the question still remains, whether the insured is entitled to abandon the goods and recover for a total loss, if the goods would arrive in specie, though of no value, if these expenses should be incurred.

SECTION IV.

OF ABANDONMENT OF FREIGHT, PROFITS, AND COMMISSIONS.

There is a total loss of freight, when the ship and cargo are totally lost,[1] or the vessel becomes wholly innavigable;[2] or is subjected to a detention of such a character as to break up the voyage.[3] It is said in some cases, that if the loss of the ship be

[1] In Idle *v.* Royal Exch. Ass. Co., 8 Taunt. 755, the vessel was beating on the rocks and was in imminent danger of going to pieces. The master sold her, with the cargo, as she lay. At the time of the sale, the cargo could not have been got out. The sale was held to be valid and the loss of freight total, although the ship was afterwards got off and repaired and took on a cargo.

[2] See Mount *v.* Harrison, 4 Bing. 388.

[3] Callender *v.* Ins. Co. of North America, 5 Binn. 525. In this case, the vessel was so much damaged, that it would have cost more than she would have been worth when repaired, to have repaired her. The cargo could not have been sent on, except at an exorbitant rate of freight, and that in a vessel not large enough to take more than half the cargo. It was admitted that the freight was totally lost, and the only question was, whether the defendants were entitled by the abandonment to a *pro rata* freight. The court held, that as the acceptance of the goods had not been voluntary, no freight was due.

only constructively total, that is, made so by abandonment, the owner may abandon also the freight, and claim as for a total loss of that.[1] But if, although the ship itself be wrecked or otherwise lost, the master can transship and forward the goods by reasonable endeavors and at reasonable cost, we have seen that it is his duty to do so; and if he neglects this duty, the insurer is chargeable only in the same way and to the same extent as if the duty had been performed, and the loss will be partial or total, according to its amount when so adjusted. The master has a right to send forward the goods if he can; and if he offers to do so, the shipper must either pay him full freight, — in which case there is no loss, — or let him send the goods forward, and on their arrival pay him freight.[2] Though it has been held, that if

[1] Ogden *v.* General Mutual Ins. Co., 2 Duer, 204; M'Gaw *v.* Ocean Ins. Co., 23 Pick. 405.

[2] In Bradhurst *v.* Col. Ins. Co., 9 Johns. 17, the vessel was lost at an intermediate port, but the goods remained and were seized by government. The underwriters were exempt from loss by seizure in port. It was held, that if the goods could have been sent on but for the seizure, the defendants were not liable. *Kent*, C. J., said: "The point is, whether it be a good defence, in any case to an action on a policy on freight, that the ship-owner refused, or neglected, to forward the goods by another vessel, when he had it in his power. We have not met with any decided case on this point; but it appears to be reasonable, and consistent with the principles of the contract, that the insurers should, in such case, be discharged. The contract is, for the insurance of the freight of the cargo on board the ship Dean, from New York to Bremen. It is not of the essence of the contract, that the cargo should, in every event, be conveyed in the ship mentioned, because the party is allowed to change the ship from necessity. The delivery of the cargo is the cause of earning freight. The ship, on board of which the goods are laden, is the vehicle of conveyance agreed on, but it is only one of the means, and not, in all cases, the indispensable means, to attain the object. It is well understood and settled, that when the vessel is disabled in the course of the voyage, and the cargo remains, the captain is authorized to forward it by another vessel, and thereby to earn the freight. If other means to forward the cargo can be procured, it depends entirely upon the captain's volition, whether he earns freight or not; and if it be lost by that volition, it ought not to be at the expense of the insurer, who only undertakes to answer for the loss of freight arising from *vis major*, and not from the act, unless it be the barratrous act of the party. If the disabled ship be easily repairable, the ship-owner is bound to do it, and he cannot in that case, resort to the insurer for his freight. If it be equally in his power to procure another vessel, and he does not, there is the same reason that he should be precluded from placing the consequences of that neglect upon the insurer."

And the language of the court in Hugg *v.* Augusta Ins. & Banking Co., 7 How. 595, 609, is no less explicit. The vessel put into Nassau in distress. She was so much damaged that it would have cost more than half her value to have repaired her so that

the vessel is lost and the goods cannot be sent forward at an expense less than the original freight, there is a total loss of freight;[1] yet, if the goods were sent on by the master, this would be on the original contract,[2] and, therefore, the ship-owner having earned his freight, would not be entitled to claim it from

she could have brought home her cargo. The cargo was much damaged and was sold. The case came before the Supreme Court on a certificate of division from the Circuit Court. One of the questions certified, was as follows: "If the jury find that, from the condition of that portion of the cargo sold at Nassau, it was for the interest of the insured and insurers upon the cargo, that it should be so sold, and not transported to Matanzas, is the plaintiff entitled to recover for a total loss of freight, provided his own vessel could have been repaired within a reasonable time, so as to perform the voyage in safety, or he could have procured another vessel and have transmitted to the port of destination, in its deteriorated state, the portion sold at Nassau." After full and elaborate arguments of counsel, the court directed it to be certified, that "If the jury find that from the condition of that portion of the cargo sold at Nassau, it was for the interest of the insured and insurers of the cargo that it should have been sold, and not transported to Matanzas, still the plaintiffs are not entitled to recover as for a total loss of freight, provided their own vessel could have been repaired in a reasonable time, and at a reasonable expense, so as to perform the voyage, or they could have procured another at Nassau, the port of distress, and have transshipped the portion sold in specie to the port of destination." It seems to have been assumed, in the case of Field *v.* Citizens' Ins. Co., 11 Mo. 50, that the underwriter would be liable for a loss of freight, if the original vessel was so much damaged, that she could not take on the goods in a reasonable time, but as the insured after the accident obtained from the insurers the following written document it was held that they were not liable for any loss consequent on the accident: "The Citizens' Company will consider themselves bound by their policy of insurance on cargo and freight bill, by the transfer of the same to steamboats Merrimack and Osage Valley on the part of the owners of the steamboat Glaucus."

[1] Willard *v.* Millers' & Manufacturers' Ins. Co., 24 Mo. 561.

[2] This was so held, in the case of Shipton *v.* Thornton, 9 A. &. E. 314, which was a suit between the master of a vessel and the owner of goods. The vessel put into an intermediate port in distress and the master forwarded the goods to the port of destination at a less freight than that originally contracted for, and the court held, that this was done under the original contract, and the consignees were liable for the whole freight which they had agreed to pay, and not merely for that paid to the substituted ship. And in Rosetto *v.* Gurney, 11 C. B. 176, 7 Eng. L. & Eq. 461, where in a case of insurance upon goods, the question was discussed, whether the master should have sent forward the goods from the intermediate port, the court said: "If the voyage is completed in the original ship, it is completed upon the original contract, and no additional freight is incurred. If the master transships, because the original ship is damaged, without considering whether he is bound to transship or merely at liberty to do so, it is clear that he transships to earn his full freight, and so the delivery takes place upon the original contract." The fact also, that the change of ship through necessity does not discharge the underwriters on goods or freight from any loss which may occur subsequently to such change of ship, shows, we think, conclusively, that the transportation is made under the original contract. See cases ante, p. 330, n. 1, and Field *v.* Citizens' Ins. Co., 11 Mo. 50, cited ante, p. 386, n. 2.

the insurer, for the latter does not stipulate that the adventure shall be profitable, but merely that he shall not be prevented by a peril of the sea from carrying on the cargo and delivering it in safety.[1] And if the master acted in this matter with good faith and reasonable discretion, the shipper must pay the extra cost of sending the goods forward.[2] And if he does not send them on, at least if it can be done at no greater expense than the original freight, it is difficult to see how the loss can be said to be total.

If the ship at an intermediate port, can be repaired and take on the goods, the ship-owner may require that they should await the ship's ability to go on. If it be for the shipper's advantage to take the goods at once, he may do so, but then he must pay full freight.[3] There is, therefore, no loss of freight in this case. And this has been held, where the delay would have been long, and the goods were damaged by water, and it would have required an expensive and long process to dry them so that they could safely go forward.[4] And the same rule applies, where the ship after sailing, puts back in a damaged condition to her original port of departure. The master is not obliged to part with the goods, except on payment of the full freight, if the goods were in such a condition that they could be taken on so as to arrive in specie.[5]

[1] Thus, in Ogden *v.* General Mutual Ins. Co., 2 Duer, 204, 215, *Bosworth*, J., said: "The underwriters on freight do not contract that the voyage shall yield a profit to the assured, nor that it shall not cost him more to deliver the cargo, according to the terms of the bill of lading, than the aggregate gross amount of freight payable on delivery of the cargo, or the sum named in the policy as the measure of the underwriters' liability in case of total loss." This point was also determined in the case of Everth *v.* Smith, 2 M. & S. 278, where a vessel which had been detained by order of the government of a foreign country subsequently obtained a cargo and reached her port of destination and earned her freight, but the expenses of the detention, made the adventure a losing one, and the court held that the underwriters were not liable.

[2] Searle *v.* Scovell, 4 Johns. Ch. 218.

[3] Lord *v.* Neptune Ins. Co., Sup. Jud. Ct., Mass., Nov. T. 1857; Jordan *v.* Warren Ins. Co., 1 Story, 342; Herbert *v.* Hallett, 3 Johns. Cas. 93; Griswold *v.* New York Ins. Co., 1 Johns. 205, 3 id. 321.

[4] Jordan *v.* Warren Ins. Co., 1 Story, 342; Saltus *v.* Ocean Ins. Co., 14 Johns. 138; Clark *v.* Massachusetts F. & M. Ins. Co., 2 Pick. 104; Mordy *v.* Jones, 4 B. & C. 394; Herbert *v.* Hallett, 3 Johns. Cas. 93.

[5] M'Gaw *v.* Ocean Ins. Co., 23 Pick. 405; Lord *v.* Neptune Ins. Co., Sup. Jud. Ct., Mass., Nov. T. 1857; Griswold *v.* New York Ins. Co., 1 Johns. 205; Ogden *v.* General

The protraction of the voyage from any cause, gives no right of abandonment, if the ship finally arrives and earns her freight.[1]

In England, it has been held, that the master is bound to repair the ship at an intermediate port, in order to bring on the cargo and earn his freight, if this can be done at an expense less than the value of the ship when repaired, although the expense would be greater than the value of the freight.[2] And if the master repairs the ship at an expense exceeding her value and that of her freight when repaired, and hypothecates both ship and freight to pay the expenses incurred, and afterwards pursues the voyage, delivers the goods, and the ship and freight are seized by the bond holders, so that the owner derives no benefit from either, this is still no loss of freight, which enables him to recover from the insurer on that interest.[3]

Nor does the fact, that the ship was totally lost, and, being insured, the freight passed by abandonment to the underwriters on the ship, make the underwriter on the freight liable if he would not have been so, had the owner not insured his vessel.[4]

Mutual Ins. Co., 2 Duer, 204. But this doctrine has been held not to apply to the Western rivers of this country. Field *v.* Citizens' Ins. Co., 11 Mo. 50. In this case, a steamboat on a trip from St. Louis to New Orleans, put back to St. Louis in a damaged state, and was repaired in two weeks. The court held, that as the trip could be made in half the time it took to repair the boat, and opportunities of reshipment occurred daily, and the character of the cargo on Western waters was generally such that it should be carried forward without delay, on account of its perishable condition and the uncertain state of the market, the insured could abandon the freight and recover a total loss. See also, Roe *v.* Crescent Mutual Ins. Co. of New Orleans, 11 La. Ann. 408.

[1] Everth *v.* Smith, 2 M. & S. 278; M'Carthy *v.* Abel, 5 East, 388.

[2] Moss *v.* Smith, 9 C. B. 94.

[3] Benson *v.* Chapman, 2 H. L. Cas. 696, 8 C. B. 950, affirming the decision of the Exchequer Chamber, which reversed that of the Common Pleas, 6 Man. & G. 792.

[4] Scottish Marine Ins. Co. *v.* Turner, 4 H. L. Cas. 312, note, more fully reported 20 Eng. L. & Eq. 24. Freight was insured from Quebec to Liverpool. The vessel met with an accident while at sea, but was kept afloat and arrived at Liverpool, where the cargo was delivered and the freight paid. But as the vessel was a wreck she was abandoned, and the abandonment being held to relate back to the time of the disaster, carried with it the pending freight, and the ship-owners were held bound to account for it to the abandonees, the underwriters on the vessel. Upon this the assured in the policy on freight brought this action, on the ground that, although the cargo reached its port of destination and freight was paid, yet that they could not hold it to their own use, but received it for the abandonees of the ship which was lost by a sea peril, and

Nor does it make no difference in this respect, that the ship and freight are insured by the same person.[1]

The rule of fifty per cent., has been held to apply to insurance on freight, as well as to the ship and cargo.[2] But as there is no loss of freight if the goods can be sent on so as to arrive in specie, this rule, we think, should not be applied. And there is, we apprehend, a difference between the freight, and the ship or cargo, in this respect, which will require some caution in its application to freight.

The actual loss of the cargo is a total loss of freight, although the ship be not lost;[3] and if the cargo be at the intermediate port in such a state, that to carry it forward would endanger the

consequently the freight was lost to them by such peril; but the court held, that the case must be treated precisely as if the ship had not been insured, and that as the freight had been earned, the underwriters were not liable. This case was approved of by *Shaw*, C. J., in Lord *v.* Neptune Ins. Co., Sup. Jud. Ct., Mass., Nov. T. 1857, and has been followed by a recent decision in New York, Fiedler *v.* New York Ins. Co., 6 Duer, 282. See also, M'Carthy *v.* Abel, 5 East, 388.

But a different decision was given in the case of Coolidge *v.* Gloucester Marine Ins. Co., 15 Mass. 341. This case was very similar to that of Scottish Marine Ins. Co. *v.* Turner, *supra*. The ship and freight were insured by the same company. The vessel put into an intermediate port in distress, where she was repaired, and the voyage was afterwards pursued and the cargo delivered in good order. The freight earned was the same, which would have been earned had the ship met with no disaster. The ship and freight were abandoned while at the intermediate port, and the abandonment of the ship accepted, but that of the freight refused. It was held, that there was a total loss of freight. The reasoning of the court does not seem to us to be satisfactory. It proceeds on the ground, that there was a constructive total loss of the ship at the intermediate port, that when the ship was rebuilt she was to be considered as a new ship, and the case was to be considered the same, as if the original ship "had sunk to the bottom of the ocean, or had been burned to ashes." The effect of this decision is to make an insurer on freight liable for the consequences of a contract with a third party, which would seem to be inequitable, and cannot, we think, be supported on principle of on authority. And, moreover, there seems to be no sufficient reason why the loss of freight should have been considered as total, even if the original ship had been burned, provided the goods remained and were forwarded, and arrived at the port of destination.

[1] Scottish Marine Ins. Co. *v.* Turner, 4 H. L. Cas. 312, 20 Eng. L. & Eq. 24; Fiedler *v.* New York Ins. Co., 6 Duer, 282.

[2] American Ins. Co. *v.* Center, 4 Wend. 45. It was held in this case, that if there is a technical total loss of the vessel insured at an intermediate port, and the expense of sending on the cargo by another vessel will exceed a moiety of the freight agreed upon by a charter party, it is a technical total loss of the freight which will authorize the assured to abandon. We know of no case resembling this, and no other where this precise point has been so decided.

[3] See the preceding cases.

safety of the ship,[1] or the lives of the crew,[2] this is considered a total loss; so is the constructive total loss of the cargo by capture or detention. But if the loss of the ship be made constructively total, by abandonment, and the insurers accept, repair, and offer to carry on the cargo of a charterer who has insured his freight, this is no loss of freight to him, any more than if the owners without abandoning, had repaired.

If the ship be injured, and a subsequent repair is necessary, which requires considerable delay, as the master has a right to retain the cargo for freight, if he delivers it up without payment of freight, this is his own fault, and not a loss by a peril for which the insurers are answerable.[3]

If the goods remain in specie, and are delivered to the consignee, freight may be demanded, and therefore is not lost, whatever be the degree of deterioration or the amount of damage; but they must remain what they originally were, and not be merely the products of decomposition, or fragments of a structure which no longer exists.[4] We have already seen in the preceding volume that if barrels or boxes in which was oil, or sugar, or salt, arrive in good order, but without the contents, the shipper is liable for the freight if the loss was owing to an intrinsic defect in the goods, as where they are lost by decay, evaporation, or leakage, but that the shipper is not liable where the contents are washed out by a peril of the sea.[5] In this latter case, therefore, as the ship-owner loses his freight by a peril of the sea, it follows that the underwriters are liable therefor, although the barrel or box arrives in safety.[6]

If the freight be wholly lost, and the ship can earn another for the same voyage, or for the remainder of the voyage, if a part has been performed, it is said that the new freight so earned,

[1] Whitney *v.* New York Firemen Ins. Co., 18 Johns. 208; Jordan *v.* Warren Ins. Co., 1 Story, 342.

[2] Hagg *v.* Augusta Ins. & Banking Co., 7 How. 595, 609; Ogden *v.* General Mutual Ins. Co., 2 Duer, 204; Williams *v.* Kennebec Mut. Ins. Co., 31 Maine, 455.

[3] See ante, p. 388, n. 3.

[4] See Vol. I. p. 215, n. 4; and ante, p. 382, n. 1–4, as to what is considered as an existence in specie.

[5] See ante, Vol. I. p. 216, 217.

[6] De Wolf *v.* State Mut. F. & M. Ins. Co., 6 Duer, 191.

is to be accounted for to the insurers on freight, as belonging to them by way of salvage.[1] But if the ship does not pursue the same voyage, but goes upon another, it has been held that the underwriters are not entitled to the freight earned on this substituted voyage.[2]

In speaking of the abandonment of the ship, it was remarked that this transferred to the insurers all the remaining rights and interests of the insured; and among these the power of earning a subsequent freight. If, therefore, the ship is insured in one place, and the freight in another, and the ship be abandoned, the insurers on the ship will take whatever subsequent freight the ship may earn. But the insurers on freight will take the freight previously earned;[3] because every abandonment refers,

[1] Green *v.* Royal Exch. Ass. Co., 6 Taunt. 68, 1 Marsh. 447; Everth *v.* Smith, 2 M. & S. 278. See also, Barclay *v.* Stirling, 5 M. & S. 6; Brocklebank *v.* Sugrue, 1 Moody & R. 102.

[2] Jordan *v.* Warren Ins. Co., 1 Story, 342. In Charleston Ins. & Trust Co. *v.* Corner, 2 Gill, 410, freight was insured at and from Monte Video to Cape Corrientes, and at and from thence to Boston. By a charter-party freight was due in Boston on the right delivery of the cargo. The vessel took in a cargo at Monte Video, went to Cape Corrientes, delivered her cargo, and, while loading another, was seized and taken back to Monte Video, where she was finally restored. The master claimed full freight from the charterer, who refused to pay it, and on a reference to arbitration, the vessel was allowed $1,200, and the charter-party was cancelled. Cape Corrientes being then blockaded, the voyage was broken up and abandoned. Forty-seven days after the capture, the master chartered the vessel on another voyage from Monte Video to Havana. The court held that the vessel on being released was not bound to proceed to Boston, and that, if she had, full freight would not have been earned, only part of the cargo being on board, that the insured could recover as for a total loss, deducting the sum received by the master on the arbitration; and that the freight received on the new voyage did not go as salvage to the underwriters.

[3] By the French law an abandonment of the ship gave to the underwriters the benefit of the freight pending at the time of the loss. Boulay Paty, tome 3, p. 481; Valin, tome 2, p. 115; Emerigon, c. 17, § 9. In England the point does not appear to be fully settled. See Luke *v.* Lyde, 2 Burr. 882; Morrison *v.* Parsons, 2 Taunt. 407; Thompson *v.* Rowcroft, 4 East, 34; M'Carthy *v.* Abel, 5 East, 388; Ker *v.* Osborne, 9 East, 378; Sharp *v.* Gladstone, 7 East, 24; Case *v.* Davidson, 5 M. & S. 79; Davidson *v.* Case, 2 Brod. & B. 379; Stewart *v.* Greenock Mar. Ins. Co., 2 H. L. Cas. 159. In this country, it seems now to be well settled that the freight earned prior to the loss, goes to the underwriter on freight, and that earned subsequent, to the underwriter on the ship. Thus, in Coolidge *v.* Gloucester Ins. Co., 15 Mass. 341, 346, Mr. Justice *Putnam* says, speaking of the loss: "Until that event happens, the property remains in the assured; and the freight or earnings, belong to him till that time, if he stands his own insurer for the freight; otherwise to the insurer on the freight. But after the loss has happened, the insurers, in virtue of the abandonment,

in point of time, to the time of the loss which justifies the abandonment. And in this country where there is an abandonment and constructive total loss and transfer, there is an apportionment of the freight. The part earned before the loss going to the insurers of freight, and no more; while that earned afterwards goes to the owner of the ship, or to his transferrees by abandonment. And demurrage, which is allowed on capture and subsequent restoration, is, we think, so far in the nature of freight, that it is to be treated as salvage on the freight.[1]

Freight, like all other insurable interests, may be valued; and we should hold, on general principles, that the valuation binds the parties, but only in reference to that property or interest which is valued. Even this, however, seems to be doubted. We think, however, that if one who is insured on valued freight, abandons, but a part of his goods, in respect to which the valuation of freight was made, arrives safely, he must account for the freight on that part according to the valuation. But if he receives freight for other goods carried safely, which belong to other shippers, he is to allow for what he actually receives and no more, because this alone belongs to the insurers in the nature of salvage.[2] Where the vessel is under a charter-party, the underwriters are sometimes liable for a total loss of the freight, although the goods have never been on board, if the goods are contracted for, and the vessel prevented from loading by a peril

become the owners, and are liable to the repairs and expenses, and entitled to the earnings of the ship." See also, United Ins. Co. *v.* Lennox, 1 Johns. Cas. 377; Leavenworth *v.* Delafield, 1 Caines, 573; Simonds *v.* Union Ins. Co., 1 Wash. C. C. 443; Kennedy *v.* Baltimore Ins. Co., 3 Harris & J. 367; Teasdale *v.* Charleston Ins. Co., 2 Brev. 190.

[1] See Coggeshall *v.* Read, 5 Pick. 454.

[2] Dumas *v.* United States Ins. Co., 12 S. & R. 437. The freight in this case was valued at $7,500. The vessel was captured, and the freight abandoned, and the loss paid. Subsequently, the vessel and a part of the cargo were restored, and the voyage performed in safety. The insured owned part of the cargo, and the rest was owned by different shippers, and shipped at various rates of freight. The underwriters claimed that the whole freight saved should be estimated at the rate of the valuation; but the insured, although he admitted his liability for his own goods, according to the valuation, yet claimed in respect to the other goods, that he was only liable for the amount actually received, and of this opinion was the court, and a doubt was expressed whether the valuation would be binding upon him in respect to his own goods.

insured against.[1] So the terms of the charter-party in many other instances determine whether or not there is a loss of freight. Thus, where the risk is entire, and a part of the voyage is performed, and the voyage is thus broken up, this is a loss of the whole freight, even if under an ordinary contract of shipment, freight *pro rata* would be due.[2]

Profits are so far distinct from cargo, that if both are insured, it is said that there may be a several abandonment of each.[3] But it is not easy to see how any thing can pass by the abandonment of profits. For the insurers on goods take by the abandonment to them every thing on which profits have been made, or can be made or saved. Indeed, it may be remarked, in general, that as an abandonment of the profits alone can pass nothing, it is not easy to see that there can be any effectual abandonment of profits, or, what would necessarily follow, that an actual partial loss of profits can be made constructively total by abandonment. If a part of the goods, the profits on which are insured, is lost, this is certainly a partial loss of the profits.[4]

If more than half in value of these goods are lost, the owner of the goods may abandon, and make the loss total; but if he

[1] See ante, p. 86–88.

[2] See Atty *v.* Lindo, 4 B. & P. 236; Charleston Ins. & Trust Co. *v.* Corner, 2 Gill, 410; Livingston *v.* Columbian Ins. Co., 3 Johns. 49; Robertson *v.* Marjoribanks, 2 Stark. 573.

[3] Abbott *v.* Sebor, 3 Johns. Cas. 39. *Kent*, J., in this case, said: "Perhaps the established rule in respect to ship and cargo of a loss of more than half the value, may be applicable. If so, the question here will be, whether the more profitable half of the cargo might not have been brought in the same ship to New York. I suggest this as a rule which may, perhaps, apply, but without giving any opinion upon it." In Tom *v.* Smith, 3 Caines, 245, it was held that as between the insured and the insurer on profits, the latter is entitled to an abandonment. And in Mumford *v.* Hallett, 1 Johns. 433, where the vessel and cargo were captured and abandoned, but afterwards restored, it was held that the insured on profits was entitled to abandon, notwithstanding the abandonment to the insurer on the cargo.

[4] In Loomis *v.* Shaw, 2 Johns. Cas. 36, profits were insured from New York to Havre. The ship and goods were captured and carried into London, and five eighths of the cargo were restored. This portion was accepted by the plaintiffs and appropriated to their own use. The court held that, "profits are necessarily incidental and subject to the final disposition of the goods, on which they are expected to accrue," and that as only three eighths of the cargo were lost, there was only a partial loss on the profits to that extent.

does, he transfers the remaining goods with all their value, and leaves nothing in himself to transfer by abandonment of the profits alone. It would seem, therefore, that the fifty per cent. rule would not apply to an insurance on profits, unless the insured should waive his right to abandon the goods, and treating the loss on them as partial, abandon the profits separately. In theory this might be possible; but it would be attended with some difficulties, and can hardly be considered as in fact, practicable. It was held, in an early case, that unless the very ship in which the goods were shipped, carried them the whole way to the port of destination, there was a loss of profits, thus making the insurance on profits equivalent to a warranty that the ship and goods should both arrive in safety.[1] But this case was probably on a wager policy, and is clearly opposed to principle.

If the insurance be on commissions, there can be no transfer by abandonment of the right or capacity of earning them; and if the peril has prevented the exercise of this right or capacity; there can be nothing to abandon, and indeed it is difficult to see, how, in practice, a party insured on his commissions can make any effectual abandonment. But if they have been earned; and the funds or property from which they are payable be partially lost or destroyed, it is possible that the remaining interest or claim in the insured may be subject to abandonment; although such a state of things is not very likely to exist in fact.[2]

[1] Henricksen *v.* Margetson, 2 East, 549, note. The vessel in this case was lost at an intermediate port, but most of the cargo was carried on at the expense of the underwriters, and arrived in safety. Lord *Mansfield*, C. J., said: "The meaning of the policy seems to be, that the ship and cargo shall arrive at the destined port, and is on the profit of that particular ship and cargo. But the market varies and may depend on twenty-four hours sooner or later; so that unless the very ship and cargo arrive, the profit may fail, and the insurance is lost."

[2] See New York Ins. Co. *v.* Robinson, 1 Johns. 616.

SECTION V.

OF THE FORM AND MANNER OF ABANDONMENT.

No especial form of abandonment is prescribed by law or usage;[1] but the word "abandon" should be used;[2] although other phrases which meant distinctly and precisely the same thing, would probably be sufficient. Nor would it seem to be strictly necessary that it should be in writing,[3] or, if in writing, in one instrument.[4] And it has been implied from the insured's handing over a consular certificate of a loss and an abandonment by the master, who had however no authority to abandon; the act of the insured in handing over the certificate being considered a ratification of the abandonment by the master.[5] However made, it must be distinct and unequivocal, and purport an absolute abandonment and transfer of all salvage to the insurers.[6] And it should state substantially the grounds on which the abandonment is made; and the cause stated must be a peril within the policy.[7] But a demand for a total loss is not, in our

[1] Bell *v.* Beveridge, 4 Dall. 272, 1 Binn. 52, note; Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604, 622, per *Thompson*, J.

[2] Parmeter *v.* Todhunter, 1 Camp. 541, per Lord *Ellenborough*, C. J.

[3] In Read *v.* Bonham, 3 Brod. & B. 147, *Dallas*, C. J., was of the opinion at *nisi prius*, that a parol abandonment was sufficient, and the point was not raised before the court *in banc*. See also, Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604, 622, per *Thompson*, J. In Crousillat *v.* Ball, 3 Yeates, 375, 378, it was stated by counsel that "In the Supreme Court of the United States, Duncan *v.* Coates, Judge *Chase* held that a verbal notice of abandonment to an insurance broker was sufficient." Lord *Ellenborough*, in Parmeter *v.* Todhunter, 1 Camp. 541, said: "It would be very well to prevent parol abandonments entirely; but if they are allowed, I must insist upon their being express. An implied parol abandonment is too uncertain, and cannot be supported."

[4] Columbian Ins. Co. *v.* Catlett, 12 Wheat. 383, per *Story*, J.

[5] Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604.

[6] Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604; Fuller *v.* M'Call, 1 Yeates, 464.

[7] In Hazard *v.* New England Mar. Ins. Co., 1 Sumner, 218, Mr. Justice *Story* said that he had always supposed that a letter of abandonment must state the cause of the loss, but for the purposes of the trial he ruled that the one in question was sufficient. In Peirce *v.* Ocean Ins. Co., 18 Pick. 83, it was stated that the vessel had been damaged, condemned, and sold, but the abandonment was held to be insufficient, *Shaw*,

opinion, necessarily and of itself the equivalent or the evidence of abandonment, because it may be only an abandonment itself which, as a previous requisite, gives the right to claim for total loss; but it has been sometimes so held; and we admit that it should be so, if the terms of the demand, aided by the circumstances of the case, could give to the demand the plain meaning and intention of making by it an abandonment and transfer of salvage.[1]

C. J., saying: "It has already been mentioned as a requisite to a good abandonment that it must state the reasons and grounds upon which a total loss is claimed." So held, also, by *Curtis*, J., in a case where the vessel was stated to have been condemned. Bullard *v.* Roger Williams Ins. Co., 1 Curtis, C. C. 148, 152. And if the owner alleges one cause he is bound by it, and cannot recover on proof of loss by another peril insured against. Suydam *v.* Marine Ins. Co., 1 Johns. 181; Dickey *v.* New York Ins. Co., 4 Cow. 222; King *v.* Delaware Ins. Co., 2 Wash. C. C. 300. The case of Macy *v.* Whaling Ins. Co., 9 Met. 354, established an exception to the general rule to the effect that where the letter of abandonment does not state the cause of the loss, but refers to intelligence which the insured has received, the abandonment will not be defective, "because the underwriter can call for the information upon which it is grounded, and time will be allowed for the purpose, before he would be required to decide as to his acceptance or refusal." The recent case of Heebner *v.* Eagle Ins. Co., Sup. Jud. Ct., Mass., Nov. T. 1857, was decided in conformity with this exception. The letter of abandonment was as follows: "Having received information of the condemnation of the steamer Chesapeake at Humboldt, California, I hereby abandon all in said vessel insured by policy, etc., and claim as for a total loss." This was held sufficient on the ground, we presume, that if the word "condemnation" did not convey a definite idea of the cause of the loss to the mind of the insurer, he could have asked for the information which the assured had received. In Ralston *v.* Union Ins. Co., 4 Binn. 386, 400, the letter of abandonment was as follows: "A letter from Messrs. T. Davy, and J. Roberts, dated London, July 8, 1805, and which came to hand yesterday, advises, 'We have now letters from Messrs. J. Ridgway, Mertens & Co., and Mr. Hemphill, of the 27th ult. and 1st inst., by the first of which we learn that the ship having been condemned as not sea-worthy, would be sold for the benefit of the underwriters.' The above information alludes to the ship Benjamin Franklin as she lay at Antwerp, and in consequence thereof, I do hereby abandon the three fourth parts of said ship, and claim as for a total loss." The court said that although the manner in which this letter was penned was very questionable, yet that they were warranted to infer from the tenor of the letter, that the different papers were exhibited therewith to the underwriters, and if these contained a valid cause of abandonment, it would be sufficient, although it was not formally expressed. In Citizens Ins. Co. of Missouri *v.* Glasgow, 9 Mo. 406, the letter of abandonment stated that the steamboat insured having been nearly destroyed by a late disaster, and being completely beyond repairs, was abandoned. It was held that though this might be insufficient in a marine policy, yet as the boat had been towed to the port where the insurance company was located, and they had caused a thorough investigation into the condition of the boat, after they received notice of the abandonment, it was enough.

[1] In Cassedy *v.* Louisiana State Ins. Co., 18 Mart. La. 421, a simple demand for a

If without abandonment a total loss is paid, this must proceed only on the ground that it was unnecessary, from the entire absence of salvage; and therefore if any salvage comes up afterwards, it would pass to the insurers as paid for by them. And if an abandonment is wanting in any formality, the insured

total loss, without the cause of the loss being stated, or any offer to abandon made, was held sufficient to entitle the assured to recover. This case is wholly unsupported by authority. Mr. *Phillips*, in his work on Insurance, § 1682, says: "A letter to the underwriters, containing a statement of the loss, and inclosing an account of the sale of the property, and claiming the balance of the amount insured, after giving credit for the salvage, was held to be a sufficient abandonment. Patapsco Ins. Co. *v.* Southgate, 5 Pet. 604. Mr. Justice *Thompson*, giving the opinion of the court said, that a letter making such a statement and claim, "leaves no doubt as to the intention and understanding of the parties." This brief statement of the case may, we apprehend, lead to an erroneous impression, not only of the point decided, but also of the meaning of the language of Mr. Justice *Thompson*, above cited. The plaintiffs stated in their letter that they forwarded thereby the protest and surveys of the vessel, and said they had heard before of the condemnation of the vessel, but did not know the cause till then, and also stated that they would forward by the next boat a statement of the loss, with the necessary vouchers. The receipt of this was acknowledged by the underwriters, who said that the further proofs of loss should receive immediate attention on arrival. When these were sent, together with a statement of the loss, the underwriters replied that they had resolved to take time to consider about the adjustment of the loss. The protest contained an abandonment by the master. Mr. Justice *Thompson* said: "This correspondence, independent of the protest, leaves no doubt as to the intention and understanding of the parties with respect to the abandonment. This would, however, be matter of inference only. But the protest is direct and explicit both in form and substance."

Lord *Ellenborough* in Parmeter *v.* Todhunter, 1 Camp. 541, held that a demand for a total loss did not amount to an abandonment, and the same was assumed to be the law in Watson *v.* Ins. Co. of N. A., 1 Binn. 47. See also, Martin *v.* Crokatt, 14 East, 465. In Murray *v.* Hatch, 6 Mass. 465, 478, *Sewall*, J., said: "If a loss had been proved in this case, total in its own nature and in the sense of the parties to this contract, limited as it is by the memorandum which has been considered, a statement of the salvage remaining is all that would be requisite in my opinion, to the claim of the assured to a total loss; that is to enable him to recover the sum insured, deducting the amount of salvage received by the assured or his agent. In this opinion, however, my brethren do not concur with me." The question was raised in Peirce *v.* Ocean Ins. Co., 18 Pick. 83, 93, but was not decided; *Shaw*, C. J., said: "A question has been made whether a claim for a total loss does not necessarily imply an abandonment. It is difficult to answer a question thus nakedly presented. Upon principle, it would seem, that a mere claim for a total loss does not necessarily imply an abandonment, because in some cases a total loss may be recovered without abandonment. But commonly a claim for a total loss will be accompanied by a statement of facts and circumstances, by the reasons and grounds of claim upon which the assured proceeds, and such statements of the grounds of claim may perhaps carry as plain an implication of actual abandonment as could be done by express words."

may waive all objection; and they do this by calling for the proof and acting as if the abandonment were altogether sufficient.[1]

SECTION VI.

OF THE ACCEPTANCE OF ABANDONMENT.

This is never necessary to the full effect of an abandonment, because the rights of the insured do not depend on the acknowledgment or assent of the insurers. But if formally made, by those having authority,[2] it binds the insurers, admits an abandonment and a valid claim for total loss, and supplies all

[1] In M'Lellan *v.* Maine F. & M. Ins. Co., 12 Mass. 246, the underwriters were informed of the loss, and a demand was made for the whole sum insured, and sundry payments were afterwards made on account of this demand. It was held that "the jury were warranted to conclude either that there had been an offer to abandon, or that both parties considered the chance of recovery as altogether hopeless, and that an abandonment would therefore be an idle ceremony; and that the loss was thereupon adjusted, and the defendants agreed to pay the sum demanded. If such an agreement were made," said the court, "without any fraud or mistake, the defendants are bound by it; and cannot now object the want of evidence of a formal offer of abandonment." See also, M'Intire *v.* Bowne, 1 Johns. 229. In Calbreath *v.* Gracy, 1 Wash. C. C. 219, it was urged that the underwriters when they received notice of the loss, instead of offering to pay, called for the papers to prove the loss, and thus dispensed with the necessity of a formal offer to abandon. Mr. Justice *Washington* said: "It is a sufficient answer to say that on the 10th July (the day, notice was given), no demand of payment was made or offer to abandon. The underwriters were not bound to hasten the assured in making their election, nor offer to pay before it was demanded. The demand of payment never was made until December, nearly four months after the assured had received notice of the capture. Whether the demand then was equivalent to a more formal abandonment, I will not determine, but if it were, it was unreasonably delayed, and so as to defeat every chance of recovery, which the underwriters would have had, if the demand had been made on the 10th of July, or in a reasonable time afterwards."

[2] In Beatty *v.* Marine Ins. Co., 2 Johns. 109, the act incorporating the company provided that "no money on losses, arising on any policy, should be paid without the approbation of at least four of the directors, with the president and his assistants, or a majority of them." It was held that an acceptance of an abandonment made by the president and his assistants without the concurrence of the four directors, was not binding on the company.

want of formality in the abandonment.[1] And because the acceptance is not necessary to give the insured his rights, there is no obligation on the insurers either to accept, or to declare that they do not accept. If they say nothing and do nothing, the conclusion should be that they do not intend to accept, and then the insured is left to whatever rights and remedies he may have upon his contract.[2] There is no especial form for an acceptance; whatever indicates sufficiently an intention to accept will have this effect; and it has been said, and on good grounds, that if the insurer refuses to accept, and expressly declares that he intends not to accept, but nevertheless does some act which can be understood or justified only as the exercise of a right which nothing but an acceptance could give, his act controls his words, and he will be held to have accepted the abandonment.[3] On the other hand, if the assured does what might

[1] In Smith *v.* Robertson, 2 Dow, 474, 482, the vessel was captured, abandoned, and the abandonment accepted. On the afternoon of the same day, news came that the vessel had been recaptured. The underwriters were held liable on the ground that "they could not be allowed to say that the loss was not total, after they had admitted that it was, and acquiesced in the abandonment as for a total loss."

[2] Mr. Justice *Story* in Peele *v.* Merchants' Ins. Co., 3 Mason, 27, 81, states the law as follows: "The underwriter is not bound to signify his acceptance within a reasonable time; nor can his silence, *per se*, be proof of his acceptance. If he says nothing and does nothing, the proper conclusion is, that he does not mean to accept. And this conclusion, so reasonable in ordinary cases, applies with still more force to corporations, because from their mode of doing business, deliberation of the board of directors is usually required; and silence in such a case is certainly less significant, than it might otherwise be presumed to be." See also, Badger *v.* Ocean Ins. Co., 23 Pick. 347. But in Hudson *v.* Harrison, 3 Brod. & B. 97, a case decided a year earlier, it was held that underwriters who intend to refuse an abandonment, must do so within a reasonable time, and their not having refused in this case till three months after the abandonment was made, was held to prove their acquiescence. We do not think that this would be regarded as law by the American courts.

[3] Peele *v.* Merchants' Ins. Co., 3 Mason, 27, 81, per *Story*, J.; Badger *v.* Ocean Ins. Co., 23 Pick. 347, 355. We have before considered the effect which the act of the repairing the ship by the underwriters has upon their refusal to accept the abandonment, and merely refer to it here. See ante, p. 362, n. 1.

In Griswold *v.* New York Ins. Co., 1 Johns. 205, 3 Johns. 321, which was an action on a policy on freight, the vessel was damaged and put back to her port of departure, and the agent of the defendants, who were also the insurers of the ship, was on board and superintended and directed the unloading of the ship. It was claimed that this amounted to an acceptance of the abandonment, but the court held that the acts of the agent were only such as were requisite to the unloading and repairing of the ship, and

defeat and avoid his abandonment, the insurers may waive the effect of these acts, and they do so by continuing to treat the abandonment as originally invalid.[1]

As a demand for a total loss is not conclusive proof of abandonment, so neither is a payment of a total loss conclusive proof of abandonment and acceptance; but it would raise a strong presumption to that effect, and if made with a knowledge of all the circumstances, would doubtless bar the insurers from availing themselves of any want either of abandonment or acceptance.[2] It has been held that a purchase of the ship by insurers, from those who bought at a sale by the master without necessity, was not equivalent to acceptance, and no admission of liability for a total loss.[3]

SECTION VII.

AT WHAT TIME THE ABANDONMENT MAY OR SHOULD BE MADE.

In general, the insured has the right of abandonment when the ship, for all the purposes of the voyage, is taken from the master's control by a peril insured against, and it is uncertain

were not referable to the subject of freight. Lord *Kenyon*, C. J., held in Thelluson *v.* Fletcher, 1 Esp. 73, that where a partial loss had taken place, and the insured wrote to the underwriters informing them of the particulars of the injury, and the answer was returned that they desired that the assured would do the best they could with the damaged property, this was not an acceptance of an abandonment if any were made.

[1] Maryland Ins. Co. *v.* Bathurst, 5 Gill & J. 159.

[2] In Tunno *v.* Edwards, 12 East, 488, the underwriter brought an action to recover back money paid under the following circumstances. The cargo insured was seized and confiscated by the Dutch government. Before the proofs of the loss arrived, the plaintiff agreed to pay the defendant £50 per cent. on account, which was accordingly done. The cargo was valued in the policy at £1,500. The Dutch government finally consented to restore half the proceeds of the cargo, which, after deducting all expenses, amounted to more than the sum at which it was valued, and this amount was paid over to the defendant. The court held that if the loss had been total, the underwriter could have maintained his action, the assured having received more than indemnity, but the loss not being total, there being no abandonment, the defendant was entitled to a verdict.

[3] Badger *v.* Ocean Ins. Co., 23 Pick. 347.

when he can again have the control of the ship, in a condition to renew the voyage, or the cost of putting her in that condition is out of proportion to her value.[1]

While we may look only at the facts as they seemed then to be, when we inquire into an exercise of extraordinary power by the master, as in selling a ship, it is said to be the rule in respect to an abandonment, that it must be justified, not by seeming, but only by existing facts. If a vessel be captured and the owners upon receiving intelligence of this, abandon her, and, before the abandonment is made, she is restored to the captain in condition to prosecute the voyage, this makes the abandonment void, although neither the insurers nor insured had, or could have had any intelligence of this restoration.[2] But this does not prevent the abandonment from being valid, if the circumstances existing at the time it is made, are such as would

[1] In Peele *v.* Merchants' Ins. Co., 3 Mason, 27, 65, Mr. Justice *Story* said: "If there be any general principle, that pervades and governs the cases, it seems to be this, that the right to abandon exists, whenever from the circumstances of the case, the ship, for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage is uncertain, or unreasonably distant, or the risk and expense are disproportioned to the expected benefit and objects of the voyage." This language seems to be applicable to the case of capture, and perhaps to blockade and embargo, but not to the submersion or stranding of the vessel, unless the loss is in the highest degree probable. See post, p. 404, n. 2 and 3.

[2] Church *v.* Bedient, 1 Caines, Cas. 21; Hallett *v.* Peyton, 1 Caines, Cas. 28; Penny *v.* New York Ins. Co., 3 Caines, 155; overruling Mumford *v.* Church, 1 Johns. Cas. 147; Slocum *v.* United Ins. Co., 1 id. 151; Murray *v.* United Ins. Co., 2 id. 263; Livingston *v.* Hastie, 3 id. 293. This point was raised but not decided, in Dorr *v.* New England Marine Ins. Co., 4 Mass. 221, Mr. Chief Justice *Parsons* observing, that in a case in the Circuit Court for the Massachusetts District, it was admitted by counsel to be the usage of merchants to be governed by the facts of which intelligence had been received, and the court considered the law to be in accordance with the usage. The law was so laid down in Scotland, Robertson *v.* Stewart, Bell, Comm. 520, but when the case came before the House of Lords, it was decided on another point. Smith *v.* Robertson, 2 Dow, 474. But in this country, although a doubt was formerly expressed by Mr. Justice *Washington*, in Beale *v.* Pettit, 1 Wash. C. C. 241, yet the law is now well settled, that the state of facts actually existing at the time of the abandonment determines the right of the assured. Marshall *v.* Delaware Ins. Co., 4 Cranch, 202, 2 Wash. C. C. 54; Alexander *v.* Baltimore Ins. Co., 4 Cranch, 370; Adams *v.* Delaware Ins. Co., 3 Binn. 287. In England, the point was presented in some cases, Bainbridge *v.* Neilson, 10 East, 329; Naylor *v.* Taylor, 9 B. & C. 718; Parsons *v.* Scott, 2 Taunt. 363; but under the English rule, stated *infra*, it was not necessary to decide it. Lord *Ellenborough*, however, in the first of these cases, at *Nisi Prius*, held that the insured was entitled to recover.

justify it,[1] although later events show the peril or the loss to have been much less than was supposed, and the recovery of the vessel easier and less costly.[2]

[1] In England the law is, that the state of facts existing at the time the action is brought, and not that at the time of the abandonment, determines the right of the assured to recover. Lord *Mansfield*, in Hamilton *v.* Mendes, 2 Burr. 1198, 1210, states the rule as follows: "The plaintiff's demand is for an indemnity. His action then must be founded upon the nature of his damnification, as it really is, at the time the action is brought. It is repugnant, upon a contract of indemnity, to recover as for a total loss, when the final event has decided that the damnification is in truth an average, or perhaps no loss at all." It is true that in this case, the vessel was restored before abandonment, so that the question did not arise, whether the facts at the time of the abandonment, or those at the time of the bringing of the action should determine the fact of the loss; but the language above cited, is the foundation for the rule as it now exists in England. M'Carthy *v.* Abel, 5 East, 388; Patterson *v.* Ritchie, 4 M. & S. 393; Bainbridge *v.* Neilson, 10 East, 329; Naylor *v.* Taylor, 9 B. & C. 718; Parsons *v.* Scott, 2 Taunt. 363. See note, *supra*. Lord *Eldon*, in Smith *v.* Robertson, 2 Dow, 474, doubts the correctness of the rule, but it seems to be well established by authority. In this country, the rule seems to be equally well settled that the right of abandonment depends upon the facts existing at the time when it is made, and cannot remain in suspense, or be divested by subsequent events. Peele *v.* Merchants' Ins. Co., 3 Mason, 27, 61; Humphreys *v.* Union Ins. Co., 3 Mason, 429; Cincinnati Ins. Co. *v.* Bakewell, 4 B. Mon. 541; Rhinelander *v.* Ins. Co. of Pennsylvania, 4 Cranch, 29; Chesapeake Ins. Co. *v.* Stark, 6 Cranch, 268; Jumel *v.* Marine Ins. Co., 7 Johns. 412; Lee *v.* Boardman, 3 Mass. 238; Dutilh *v.* Gatliffe, 4 Dall. 446, 4 Cranch, 31, note; Schieffelin *v.* New York Ins. Co., 9 Johns. 21, 26. In Munson *v.* New England Marine Ins. Co., 4 Mass. 88, the loss was not payable by the terms of the policy, until sixty days after notice of the loss. At the time the abandonment was made the vessel was detained by captors, but was restored before the expiration of the sixty days. The court held, that the right to recover for a total loss vested in the assured by the abandonment and could not be affected by the credit given to the assurers. In Dutilh *v.* Gatliffe, *supra*, it was held, that if the abandonment was made before the vessel was restored, though after the decree of acquittal, it was valid, and the assured might recover as for a total loss, but this point has been determined otherwise by the Supreme Court of the United States. Marshall *v.* Delaware Ins. Co., 4 Cranch, 202. *Marshall*, C. J., said: "The court cannot suppose such a danger to have existed after a final sentence of acquittal, unless some order of a court relative to a reconsideration could be shown, or it should appear that some other delays were interposed by the court which had pronounced the sentence, or by the sovereign of the captor." In a subsequent case in Pennsylvania, the court distinguished these two cases on the ground, that in Dutilh *v.* Gatliffe, the vessel had been condemned by an inferior court, from which an appeal might have been taken, and it was held, that after an acquittal and an order of restitution had been given by the court of last resort, an abandonment could not be made, although it were before the vessel had been actually restored. Adams *v.* Delaware Ins. Co., 3 Binn. 287.

[2] See cases cited in preceding note. In Peele *v.* Merchants' Ins. Co., 3 Mason, 27, 40, *Story*, J., said: "We are not to judge of this case by subsequent events, except so far as they operate by way of evidence upon the preëxisting state of the ship. The

For, it is distinctly held that, if a stranded ship be abandoned, under circumstances which sufficiently indicate the hopelessness of her condition, this abandonment is valid, although the purchasers, or the insurers, may succeed in getting her off and repairing her with little difficulty or cost; the ship being found not to be in so bad a condition as was thought, and in such a state that a subsequent abandonment would have been ineffectual.[1]

It is quite certain, however, that neither stranding,[2] nor submersion,[3] nor any loss that leaves the probability of recovery, gives, of itself, at once, and necessarily, the right to abandon; for it is the duty of the master to examine sedulously, and use to the best of his skill and power, all means for recovery; and there is no right to abandon until these means are used, or until it is obvious from the nature of the loss or the circumstances attending it, that there is but little, if any hope of success. In the case of capture, however, it is said that this is a constructive total loss, while the ship is in the hands of the captors; but liable to become only partial, if abandonment is not made till she is returned to her owners.[4] And if a vessel, however lost for a time, be afterwards restored to the owners, she may still be

right of abandonment depended altogether upon the facts as they *then* were, and upon the conclusions which reasonable men ought then to have drawn from them in the exercise of sound discretion."

[1] Peele *v.* Merchants' Ins. Co., 3 Mason, 27; Fontaine *v.* Phœnix Ins. Co., 11 Johns. 293; King *v.* Middletown Ins. Co., 1 Conn. 184; Howland *v.* Marine Ins. Co., 2 Cranch, C. C. 474.

[2] Bosley *v.* Chesapeake Ins. Co., 3 Gill & J. 450; Wood *v.* Lincoln & Kennebec Ins. Co., 6 Mass. 479; Patrick *v.* Commercial Ins. Co., 11 Johns. 9, per *Kent*, C. J.; Howland *v.* Marine Ins. Co., 2 Cranch, C. C. 474.

[3] In Anderson *v.* Royal Exch. Ass. Co., 7 East, 38, 42, Lord *Ellenborough*, C. J., seems to have been of the opinion that an effectual abandonment might be made of a cargo of corn, while it was under water. And in Poole *v.* Protection Ins. Co., 14 Conn. 47, 58, it is stated that the liability of the insurers attached the moment the goods were submerged. These remarks, we think, are incorrect, and the doctrine of the text is fully supported by the case of Sewall *v.* United States Ins. Co., 11 Pick. 90, where *Shaw*, C. J., said: "We think, therefore, it comes to this, that submersion, like stranding, or other serious disaster, is to be taken in connection with other circumstances in determining whether the loss is or is not total. These circumstances, among others, are the depth of the water, the distance from shore, the condition of the bottom, whether soft or rocky, the roughness or smoothness of the sea, the season of the year, and whether the means of relief are at hand."

[4] See ante, p. 402, n. 2, p. 403, n. 1.

abandoned if the costs, charges, burdens, or liens upon her, springing from the loss, are sufficient in amount to make the loss total,[1] but not otherwise.[2] And it is a question for the jury in every case, whether the recapture has deprived the assured of his right to abandon.[3]

In wager policies, any loss of the voyage, may give the assured the right to abandon the ship,[4] but this is not true in respect to an interest policy. The insurance is "on the ship for the voyage," and that is an undertaking on the part of the underwriter that the ship shall, nothwithstanding the perils insured against, be physically able to perform the voyage; and the insurers do not warrant that the assured shall gain by the voyage, and it is consequently of no importance, if the voyage is given up, that it could not have been performed save at a loss, if the ship was capable of going on.[5]

[1] M'Iver *v.* Henderson, 4 M. & S. 576; Cologan *v.* London Ass. Co., 5 M. & S. 447; Holdsworth *v.* Wise, 7 B. & C. 794; Hamilton *v.* Mendes, 2 Burr. 1198, 1209; Messonier *v.* Union Ins. Co., 1 Nott & McC. 155. In Dean *v.* Hornby, 3 Ellis & B. 180, 24 Eng. L. & Eq. 85, a vessel insured under a time policy was captured and recaptured and sent to England. On the way, and after the risk had expired, she met with a sea peril, and was taken into port for repairs, and was there sold by the prize master. From the time of the capture, the vessel had been in the possession of the prize crew. On her arrival in England, proceedings were had in the Admiralty Court, without prejudice to the legal rights of the parties, and possession was decreed to the owners. The assured abandoned after the termination of the risk, but as soon as they had intelligence of the capture, and the court held they were entitled to recover as for a total loss.

[2] See cases *supra*, p. 403, n. 1.

[3] Marine Ins. Co. of Alexandria *v.* Tucker, 3 Cranch, 357.

[4] Pond *v.* King, 1 Wilson, 191; and cases cited in Millar, Ins. 314–323.

[5] Pole *v.* Fitzgerald, Exch. Ch., Willes, 641. The jury in this case found a special verdict to the effect that the vessel was insured for four months on a cruising voyage, free from average, that the crew mutinied and carried her into port, where she was in good safety at the end of the time, and that the cruise was totally lost. Under these circumstances it was held, reversing the decision of the King's Bench, that the underwriters were not liable, on the ground that in all policies on a ship, the insurance is not on the voyage, but on the ship for the voyage. This was affirmed in the House of Lords, 4 Brown, 439. Notwithstanding the plain and forcible exposition of the law by *Willes*, C. J., in this case, and the affirmance of his decision by the House of Lords, Lord *Mansfield* in several subsequent cases seems to have paid no regard to it. See Goss *v.* Withers, 2 Burr. 683; Hamilton *v.* Mendes, 2 Burr. 1198; Milles *v.* Fletcher, 1 Doug. 231; Manning *v.* Newnham, 3 Doug. 130; Cazalet *v.* St. Barbe, 1 T. R. 187; Rotch *v.* Edie, 6 T. R. 413. Some of these cases may be supported on other grounds, and need to be referred to here only as matters of history, the law

If a vessel is insured for a certain voyage which is to be performed by the terms of the contract within a certain time, it would seem that if she is prevented from performing the voyage within the time, an abandonment might be made; but if the vessel is detained and then released, and there is sufficient time in which to finish the voyage, the assured cannot abandon.[1]

As a general rule, the insured has no right to abandon on account of the fear of a loss by a peril insured against, unless that fear by its force and intensity, be equivalent to force; and *a fortiori* he has no right if the peril be not insured against.[2]

being now firmly established in accordance with the decision in Pole *v.* Fitzgerald. See Parsons *v.* Scott, 2 Taunt. 363; Falkner *v.* Ritchie, 2 M. & S. 290. In this case, Lord *Ellenborough*, C. J., said: "What has a loss of the voyage to do with the loss of the ship? On this subject there is so much good sense in the judgment of *Willes*, C. J., in Pole *v.* Fitzgerald, that it may be of great use to resort to it in order to purify the mind from these generalities." See also, Brown *v.* Smith, 1 Dow, 349, 359, per Lord *Eldon*, Ch., Kemp *v.* Vigne, 1 T. R. 304; Alexander *v.* Baltimore Ins. Co., 4 Cranch, 370; Ritchie *v.* United States Ins. Co., 5 S. & R. 501; Oliver *v.* Newburyport Ins. Co., 3 Mass. 51; Bradlie *v.* Maryland Ins. Co., 12 Pet. 378, 401; Church *v.* Marine Ins. Co., 1 Mason, 341; Hurtin *v.* Phœnix Ins. Co., 1 Wash. C. C. 400; Ruckman *v.* Merchants' Louisville Ins. Co., 5 Duer, 342, 366; Goold *v.* Shaw, 1 Johns. Cas. 293, affirmed, 2 id. 442.

In Abbott *v.* Broome, 1 Caines, 292, it was held that an abandonment might be made if the ship was in such a condition that she could not be repaired, so as to take the whole of her cargo to her port of destination. But this is inconsistent with the doctrine that the voyage and the ship are distinct subjects, and it has been decided the other way in England. Doyle *v.* Dallas, 1 Moody & R. 48, where the court decided that if the vessel could be repaired so as to carry any cargo, it was sufficient, and were inclined to the opinion that it was enough if she could prosecute the journey only in ballast.

[1] Messonier *v.* Union Ins. Co., 1 Nott & McC. 155.

[2] See cases ante, p. 248, n. 1. In Messonier *v.* Union Ins. Co., 1 Nott & McC. 155, a Spanish vessel, engaged in the African slave-trade, was seized by the English and restored, but she was forbidden to pursue her voyage. The captain abandoned on the ground of the fear of condemnation if he had attempted to pursue his voyage. It was held that as the British authorities had no power to condemn a Spanish vessel engaged in the slave-trade, the fear of the condemnation furnished no ground for an abandonment. The court said: "The fear which will justify an abandonment, must be a just fear, amounting to the *vis major*, illustrated by 'the fear of being made a slave or prisoner, or of perishing in a case of extremity, or where defence becomes impossible.' Emerigon, tome 1, p. 507–512, c. 12, § 26. It is a clear and well-settled principle in the law of insurance, that the fear of a loss, is not the loss itself, and is no justifiable cause of abandonment. The supercargo was threatened with capture, but it was a mere threat, without any legal authority to support it. The abandonment proceeds from some other considerations with which the insurers have no concern."

The desertion of the crew is no cause for an abandonment of the voyage, if another crew can be obtained, and it is no excuse that the master had no provisions with which to feed another crew, because it is the duty of the master to obtain them.[1]

The insured must, on receiving proper intelligence, abandon (unless it is otherwise agreed), or he will be held to have elected not to abandon, and will lose the right to abandon.[2] It is said in some cases to be a question for the court to determine in each particular case, on all the evidence, whether the abandonment was made in a reasonable time,[3] but we apprehend the more correct rule is, that it is a mixed question of law and fact, to be determined by the jury under the direction of the court.[4] We give in the note some instances where a specified time has been held a delay; but little reliance, however, can be placed on adjudged cases on this point, as they are considered on their own peculiar circumstances, and each case must be determined on its own merits.[5] If an abandonment (when necessary) is not

[1] Messonier *v.* Union Ins. Co., 1 Nott & McC. 155. It was also urged in this case, that the voyage, which was one to procure slaves, was broken up because the only seamen which could be obtained were American seamen, who were compelled to go on board; but the court held, that there was no ground for fear of condemnation by the English court on this account, because the admiralty of one nation cannot carry into effect the laws of another, and also because the Act of Congress imposed a penalty only on those who engaged voluntarily in the trade, and not on those who were compelled to enter into it.

[2] Allwood *v.* Henckell, per Lord *Kenyon*, C. J., Park, Ins. 239; Roux *v.* Salvador, 3 Bing. N. C. 266, 281, per Lord *Abinger*, C. J.; Teasdale *v.* Charleston Ins. Co., 2 Brev. 190.

[3] Read *v.* Bonham, 3 Brod. & B. 147; Hudson *v.* Harrison, 3 Brod. & B. 97, 105.

[4] Chesapeake Ins. Co. *v.* Stark, 6 Cranch, 268; Maryland Ins. Co. *v.* Ruden, id. 338; Livingston *v.* Maryland Ins. Co., 7 Cranch, 506; Hurtin *v.* Phœnix Ins. Co., 1 Wash. C. C. 400; Reynolds *v.* Ocean Ins. Co., 22 Pick. 191, 193. In Smith *v.* Newburyport Mar. Ins. Co., 4 Mass. 668, *Parsons*, C. J., said: "What is a reasonable time must depend on facts. When the facts are agreed or found it is a question of law."

[5] Thus in Savage *v.* Pleasants, 5 Binn. 403, where the loss was known in February, and the abandonment made in the following May, it was held to be too late. So, of an abandonment made May 21, intelligence having been received April 4. Krumbhaar *v.* Marine Ins. Co., 1 S. & R. 281. A delay of thirty-five days was held fatal in Barker *v.* Blakes, 9 East, 283; forty-five days, Smith *v.* Newburyport Ins. Co., 4 Mass. 668; twenty-six days, Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456, 458; nine days, Mellish *v.* Andrews, 15 East, 13; five days, the goods being insured free from average, Hunt *v.* Royal Exch. Ass. Co., 5 M. & S. 47; eighteen days, Aldridge *v.* Bell, 1 Stark. 498. In Mitchell *v.* Edie, 1 T. R. 608, the goods insured were sold,

made in a reasonable time, the insurers are not liable for a total loss, although no damage can be shown to have accrued to them by reason of the delay.[1] But the proof of the delay must be clear and positive, and it is not sufficient to show that the letter informing the insured of the loss was dated some time before he abandoned.[2] The reason for requiring immediate abandonment, is, that the insurers should be put in a position to make the most of the salvage transferred to them, as soon as possible.

Even if it be stipulated that he shall not abandon until so many days after intelligence or proof of loss, he may still abandon at once on receiving this intelligence; and if he then hands over the papers and proof, and continues his claim, the abandonment

and the owners after waiting two or three years to get the proceeds, abandoned, the agent who had the money having become insolvent. Held that it was too late. In Fleming *v.* Smith, 1 H. of L. Cas. 513, a vessel insured on a time policy was compelled by perils of the sea to put into Mauritius. The master wrote to the owners telling of the injuries the vessel had received, and of his intention to raise money on bottomry for the purpose of making the repairs. Other letters were written, which were received between September and December, 1842. In the latter month, the owners wrote, expressing their surprise at the amount required, at the same time saying that they supposed that what was done was the best that could be done under the circumstances. The repairs exceeded half the value of the vessel, and three days after the vessel arrived home the owners abandoned. Held that the abandonment was not made in time. See also, Kelly *v.* Walton, 2 Camp. 155. In Bell *v.* Beveridge, 4 Dall. 272, 1 Binn. 52, note; the cargo was seized by a foreign government, and the plaintiff had notice of it in August, 1793. The yellow fever soon afterwards made its appearance, and the plaintiffs went into the country on the 10th of September, 1793, and returned November 19, and then went on a journey to South Carolina, and did not abandon till the 21st day of January, 1794. The court held that there did not appear to be any design to waive the right of abandonment, though its exercise was suspended by a public calamity, and other fortuitous circumstances. Although the assured might be excused from exercising his right of abandonment during the epidemic, yet the subsequent delay seems hardly justifiable. See also, M'Calmont *v.* Murgatroyd, 3 Yeates, 27. In Duncan *v.* Koch, J. B. Wallace, 33, there was a delay of ten days, while the papers were in the hands of a notary for the purpose of being translated and the loss adjusted, before notice was given to the underwriters; but no notice was taken of this delay by the court. In Gardner *v.* Columbian Ins. Co., 2 Cranch, C. C. 550, the loss was known November 24. The protest and letter of abandonment was sent to the defendant December 26. The master arrived December 12, and there was no evidence of the arrival of any authentic proof prior to that date. Held that the abandonment was not too late. See also, Read *v.* Bonham, 3 Brod. & B. 147.

[1] Mellon *v.* Louisiana State Ins. Co., 17 Mart. La. 563.

[2] Marine Ins. Co. of Alexandria *v.* Tucker, 3 Cranch, 357.

will be valid, although he cannot claim payment any sooner than if he had delayed the abandonment;[1] but if the property is restored before the expiration of the time, the right to abandon is gone.[2] Where a policy contained a clause warranting not to abandon in case of capture or detention until six months after notice thereof given to the insurers, it was held that if the vessel was condemned the assured could abandon immediately.[3]

The abandonment may be made on any actual information, however it be derived, if it be worthy of trust and credit; and might even be made, under some circumstances, upon a general rumor and belief;[4] but it should not be made on mere conjecture or possibility.[5] And if the first intelligence received be not such as ought to be trusted and received as authentic, the insured has a right to wait until he receives more certain intelligence.[6] It would, however, be dangerous to press this too far;

[1] Livingston *v.* Maryland Ins. Co., 6 Cranch, 274, 7 Cranch, 506. In Columbian Ins. Co. *v.* Catlett, 12 Wheat. 383, the policy contained the following clause: "It is hereby agreed that the insured shall not abandon to the insurers until sixty days have elapsed after having given notice to them of his intention so to do, and of the loss or event which may entitle the insured thereto." It was held that the party might abandon at any time, the abandonment taking effect at the expiration of the sixty days. See also, Lovering *v.* Mercantile Ins. Co., 12 Pick. 348; Clarkson *v.* Phœnix Ins. Co., 9 Johns. 1.

[2] Dorr *v.* Union Ins. Co., 8 Mass. 502; Delano *v.* Bedford Mar. Ins. Co., 10 Mass. 347. See Law *v.* Goddard, 12 Mass. 112.

[3] Ogden *v.* Columbian Ins. Co., 10 Johns. 273.

[4] In Muir *v.* United Ins. Co., 1 Caines, 49, it was doubted whether an abandonment could be made upon newspaper information.

[5] In Bosley *v.* Chesapeake Ins. Co. 3 Gill & J. 450, it was held that since the abandonment must state the cause of the loss, it is necessary that not only the existing facts should constitute a total loss, but also that the assured should be informed of the accident which occasioned it, and that he cannot therefore abandon upon the apprehension that a loss has taken place, and afterwards establish his right to do so by facts that subsequently come to his knowledge. The language of Lord *Ellenborough*, however, in Bainbridge *v.* Neilson, 1 Camp. 237, 10 East, 329, 341, shows that that learned judge considered the law to be that the insured might abandon upon any intelligence whatsoever, and his right to recover depended merely upon the truth or falsehood of such information.

[6] Gardner *v.* Columbian Ins. Co., 2 Cranch, C. C. 550. In Duncan *v.* Koch, J. B. Wallace, 33, 45, *Griffith*, J., said: "In cases of this kind it is difficult to propose a rule by which to determine what shall be notice of a loss, to the assured: much must depend on circumstances. If the loss be well authenticated, or well known, immediate

for the rule — as illustrated by its reason — must be, that if the intelligence or information be such as might call upon the insurers to take at once any precautionary measures, or any incipient steps towards the recovery of the salvage, they must be entitled to the information because they may be prejudiced by the withholding it. So, if the effects of the peril or loss are not yet ascertained, or if efforts are making for the recovery of the vessel, there may be some delay for these reasons; because, after abandonment the property belongs to the insurers, and the insured might discontinue efforts to save that which was no longer theirs; and it is for the interest of the insurers that such efforts should be made.[1]

dereliction should be tendered by the assured. If not certainly known, but from strong evidence fully believed, and he suspends his option with a view to avail himself of some favorable contingency for the disposition of the property insured on his own account, this might, if the loss had in fact happened (though I do not say it would), turn the property upon him, at its full or supposed value. But such intent must certainly be proved, and clearly proved, not inferred from slight circumstances, or from the probability that such would naturally be a motive with the assured for delaying a surrender to the underwriters."

[1] In Reynolds *v.* Ocean Ins. Co., 22 Pick. 191, 193, *Shaw*, C. J., instructed the jury, in a case where a vessel was stranded and the assured did not abandon till eleven days afterwards, that if they were satisfied, that upon the first information the assured were in a state of uncertainty as to the actual condition of the vessel, and waited a few days for more definite information, and not with a view to speculate upon chances, if the vessel was stranded and not bilged, and if the length of time she remained ashore had increased the probability that she could not be got off, and the loss continued total at the time of the abandonment, there were circumstances tending to show that the abandonment was made within a reasonable time. These instructions were held to be correct by the full court. And in Gernon *v.* Royal Exch. Ass. Co., 6 Taunt. 383, where an abandonment was delayed in order that the condition of a damaged cargo of sugars might be ascertained, *Gibbs*, C. J., delivering the opinion of the court, after stating the general rule to be that the assured must elect in the first instance whether he would consider the loss total or partial, said: "The first instance means, after the assured has had a convenient opportunity of examining into the circumstances which render abandonment expedient or otherwise; because it is on the result of that examination that he is to make up his mind, whether he will abandon or not. Let it not be supposed that I accede to the proposition, that the assured may use this latitude as an opportunity to judge of the state of the markets, and as the markets fall and rise, to elect whether he will abandon or not abandon. He has no right to govern his conduct by any such rule. The only examination he may make, is into the actual state of the cargo, to ascertain what is the degree of damage, without reference to the state of the markets. See also, Teasdale *v.* Charleston Ins. Co., 2 Brev. 190; Anderson *v.* Royal Exch. Ass. Co., 7 East, 38.

It is said in some American cases, that the abandonment may be made at any time, so long as the loss continues to be total.[1] This however must mean so long as the loss continues *actually* total; as by capture and condemnation. But even here, it is difficult to see what reason or equity there can be in any other rule, than that if an abandonment be unnecessary, it is no matter when it is made, because it need not be made at all. But if it must be made for the purpose of transferring salvage, it should be made at once, that the insurers may be able to derive the utmost advantage from it. At all events, it must be certain that there can be no delay which does not destroy the right of abandonment, if such delay prejudice or impair the rights of the insurers to indemnify themselves by the salvage, to the utmost practicable extent.

Even, however, if the insured has lost the right of abandonment by his delay or neglect, there are cases which indicate that he may recover that right if there be some new, additional, independent, and materially injurious effect of a peril insured against. It is perhaps on some ground like this, that in case of capture it has been held that the assured need not abandon as soon as he hears of the detention, but may wait till the vessel is condemned, and then, without taking an appeal, abandon; but we think the cases so deciding are far from satisfactory.[2]

[1] Brown *v.* Phœnix Ins. Co., and Montgomery *v.* United States Ins. Co., 4 Binn. 445; Roget *v.* Thurston, 2 Johns. Cas. 248; Lawrence *v.* Sebor, 2 Caines, 203; Steinbach *v.* Columbian Ins. Co., 2 Caines, 129, 132, where an abandonment fifteen months after seizure was held to be good. In Tom *v.* Smith, 3 Caines, 245, it was held that this rule did not apply where the assured had treated the loss as partial. In Livermore *v.* Newburyport Mar. Ins. Co., 1 Mass. 264, 277, it was held that in case of capture as well as in any other case of constructive total loss, a seasonable abandonment must be made, and it is not enough that the loss continues to be total. *Sewall*, J., in speaking of the passage from Marshall, which seems to support the rule contended for, said: "The rule respecting the manner of exercising that right is too well established to be shaken or rendered in any degree doubtful by the mere statement of an author, without any adjudged case to support it." But see the dictum of the same learned judge in Dorr *v.* New England Ins. Co., 11 Mass. 1, 5.

[2] There appears to be some misapprehension as to the effect of the authorities on this subject. Mr. *Arnould* states it to be the established English doctrine that no abandonment can be made in case of condemnation, but that the assured should abandon on receiving intelligence of the seizure. 2 Arnould, Ins. 1166, citing Mullet *v.* Shedden, 13 East, 304; Mellish *v.* Andrews, 15 East, 13. In the former case the cargo insured was seized and condemned, and taken out of the vessel and sold. No

SECTION VIII.

OF REVOCATION OF ABANDONMENT.

We have seen that no person insured need abandon, unless he chooses to; but if he does so, he tenders thereby an absolute

abandonment was made until after the news of the condemnation and sale arrived. An appeal was taken, and the decree of condemnation reversed, the seizure being held to be illegal. Lord *Ellenborough* said: "If instead of the saltpetre having been taken out of the ship and sold, and the property devested, and the subject-matter lost to the owner, it had remained on board the ship, and been restored at last to the owner, I should have thought there was much in the argument, that in order to make it a total loss, there should have been notice of abandonment, and that such notice should have been given sooner: but here the property itself was wholly lost to the owner, and therefore the necessity of any abandonment was altogether done away." So in Mellish *v.* Andrews, 15 East, 13, where, subsequent to the abandonment, which was not made in a reasonable time after notice of the vessel being seized, the cargo was unladen by a military force acting under the orders of a foreign government, and was never restored, it was held that no abandonment was necessary, and the question whether an abandonment could be made, was not decided. The case of Kelly *v.* Walton, 2 Camp. 155, is cited by Mr. *Phillips*, § 1669, to the point that a subsequent abandonment may be made, if the detention continues so long that it is of no use to pursue the adventure. The insurance in this case was on a cargo of flax-seed from the United States to a port in Ireland. The vessel was detained by an embargo, information of which was received February 11, 1808, but no abandonment was made till the 11th of June following. It was proved by an Irish statute, that no flax-seed can be sold for sowing, unless that of the growth of the preceding year, and that the sowing season commenced in March and ended on the 10th of May. It was accordingly insisted that the plaintiff had a right to wait while there was a possibility of its arriving in time, and afterwards to abandon. Lord *Ellenborough* held that the right to abandon on account of the detention was gone on the insured's not abandoning at first, and that if it had revived by the new state of circumstances, yet that it had not been exercised in time.

In Dorr *v.* Union Ins. Co., 8 Mass. 494, where a vessel was seized for a cause which the assured knew did not in fact exist, it was held that an abandonment, made on intelligence being received of the condemnation, was in sufficient time. The same point was determined in Dorr *v.* New England Ins. Co., 11 Mass. 1, which differed from the case against the Union Insurance Co., in the fact that the policy, which was on time, had expired before the condemnation took place, but the court held that this made no difference. In many cases in this country, the courts seem to proceed on the ground that the assured can in any case, and for any purpose wait till the condemnation, and then abandon. Earl *v.* Shaw, 1 Johns. Cas. 313; Bohlen *v.* Delaware Ins. Co., 4 Binn. 430; Maryland Ins. Co. *v.* Bathurst, 5 Gill & J. 159, 221. And in Mey *v.* Tunno, 2 Bay, 307, it was held that he might abandon if the vessel was ordered to

transfer to the insurers; and if they accept — expressly or by implication — this makes the transfer irrevocable.[1] The insurers may waive their right; they may consent to the revocation of the abandonment; and this also, they may do expressly or by implication. In like manner, the insured acquires by his abandonment certain rights of which he cannot be divested against his will; but he may waive these also, and either expressly or by implication of law.

If a sale is made by a Court of Admiralty having jurisdiction over the subject, it seems that the mere fact that the master purchased the vessel, would not affect the right of the assured to claim as for a total loss.[2] But if the sale is made by the master

be released by the court, but required to give bonds to abide an appeal by the captors. But in Smith *v.* Delaware Ins. Co., 3 Wash. C. C. 127, it was held that if an abandonment is delayed to take the chance of an acquittal, and to speculate upon the high market for the goods, the delay is fatal. See also, Calbreath *v.* Gracy, 1 Wash. C. C. 219.

We are very much inclined to doubt the rule that the mere continuance of a peril, or the aggravated result of the peril should give the assured the subsequent right of abandonment. It is true that on the occurrence of a peril the assured need not abandon, but may exercise that right if another independent peril occur, but we should be inclined to limit it to this, and to deny him the right when the final loss was a consequence of the peril, more especially when there was a probability of its taking place.

[1] See ante, p. 399.

[2] One of the earliest cases on this subject is Welman *v.* Gray, Sup. Jud. Court, Mass., Nov. T. 1799, 2 Dane, Ab. ch. 40, art. 7, § 14. The vessel was captured by a privateer, condemned and sold at public auction, and was bought by Welman, who was the owner and master. Mr. Dane says: "There was no doubt but that the property was changed; but it was urged by the defendant, that the master abroad is agent for the owners or underwriters, as the case may be, and that if he buy the vessel after condemnation, she shall be considered as recovered; and only an average loss paid. The court held, that Welman purchased for himself; and if a recovery, there was no change of property; had the owner confirmed the master's purchase, it had only been a partial loss." Although the final language of the above expression is ambiguous, yet we think the case decides that where the master and owner are the same person, and the master buys the vessel at a sale under a decree of the Court of Admiralty, this is considered as a purchase by him as owner, and the underwriters are only liable as for a partial loss.

In Storer *v.* Gray, 2 Mass. 565, the vessel was captured and recaptured, and sold by the Court of Admiralty to pay salvage. The vessel was bought by the master and by him delivered over to the former owners. They did not abandon, but offered to credit the defendants with the proceeds of the sale. The court held the loss to be total, on the ground, as stated by *Sewall*, J., in Oliver *v.* Newburyport Marine Ins. Co., 3 Mass. 37, 53, that the decree changed the property, that the master might purchase for himself, and make a present of the vessel or sell it to the assured, and that they then took it by a new title. So, in Sawyer *v.* Maine F. & M. Ins. Co., 12 Mass. 291, it was

himself,[1] or by the decree of any tribunal which has no authority to order a sale,[2] or even by the Court of Admiralty, if at the instigation of the master,[3] and the master purchases the vessel for the benefit of the owners and they afterwards exercise any act of ownership over it, the abandonment will be considered as waived.[4]

held, that where a master in such a case, bought a vessel on his own account without any previous authority or posterior assent on the part of the owners, they were entitled to recover for a total loss. In Maryland Ins. Co. *v.* Bathurst, 5 Gill & J. 159, 231, it was held, that where a vessel is condemned, the assured is divested of all property in her, and may purchase her, and hold her as purchaser against all the world, except the underwriters, and the latter must elect within a reasonable time, whether to accept or not. If they decline to accept the abandonment, this is considered as a waiver of their right to object to the validity of the sale. But in some cases, no distinction is taken between a sale by a decree of a Court of Admiralty, and a sale by the master, and in either case, it has been held that the owner, if he afterwards received the property and exercised acts of ownership over it, waived his right to recover for a total loss. Saidler *v.* Church, cited 1 Caines, 297, note; Queen *v.* Union Ins. Co., 2 Wash. C. C. 331.

[1] In Story *v.* Strettell, 1 Dall. 10, the vessel was sold by an agreement between the captain and persons who had recaptured the vessel. The captain bought her for the owners, who afterwards acquiesced in the sale, and the loss was held to be but partial.

[2] M'Masters *v.* Shoolbred, 1 Esp. 237; Wilson *v.* Forster, 6 Taunt. 25.

[3] Oliver *v.* Newburyport Marine Ins. Co., 3 Mass. 37; Abbott *v.* Broome, 1 Caines, 292.

[4] Thus, if the owners fit out the vessel and send her on a new voyage, their right of abandonment is gone. Saidler *v.* Church, cited 1 Caines, 297, note. In Abbott *v.* Broome, 1 Caines, 292, the supercargo, who was also the part-owner, became the purchaser of the vessel on account of the owners at a port of distress, and took the vessel to her home port where she was sold by the plaintiff without the consent of the underwriter. Held, that the plaintiff under the circumstances of the case, had abandoned the vessel while the loss continued total, and that the act of sale was not a waiver of the abandonment, because as the underwriter refused to accept the abandonment, the plaintiff was justified, having possession of the vessel, to sell her on account of whom it might concern. So held also, in Walden *v.* Phœnix Ins. Co., 5 Johns. 310; Livingston *v.* Hastie, 3 Johns. Cas. 293. But it has been held in England, that if the master buys the vessel on account of the owners, they cannot refuse to accept it and thus make the loss total. Wilson *v.* Forster, 6 Taunt. 25, 1 Marsh. 425. And in New York, the court decided that if the owner sold as trustee of the underwriter, he could not buy the vessel himself. Ogden *v.* New York Fire Ins. Co., 10 Johns. 177, 12 Johns. 25.

And, generally, if the owner of the vessel or cargo buys it at a sale made by the master, he cannot claim a total loss. Robertson *v.* Western Marine & F. Ins. Co., 19 La. 227. In this case the court observed: "This rule is said to be founded in sound policy, to prevent fraudulent speculations upon a loss, at the expense of the insurer. It rests also, on the broad and well-known principle, that a trustee cannot

A sale, even by the owner himself, if justified by the circumstances, and having no purpose in view but that of saving the remaining property, as salvage for the insurers, from utter destruction, would not take from him any rights acquired by abandonment; and although he acted and gave title to the ship in his own name, it would be supposed that he acted as the agent of the insurers.[1] It would be necessary, however, in order to make such a transaction correct and compatible with a valid abandonment, that the owner and insured should either have consulted the insurers and obtained their directions, or else be in a situation where he could not consult them, and could save their property by no other means than by an immediate sale. But it has been held that if, after an abandonment, the vessel is sold by the agents of the underwriters at a public sale, the former owner may become a purchaser without waiving his abandonment.[2] Generally speaking, if an owner of a ship after abandonment, still keeps his ship in his hands, and repairs the injury, it will be regarded as a virtual waiver of his abandonment.[3]

If insurance is effected in the name of A, for the benefit of whom it may concern, although perhaps A may have the right

become the purchaser of the estate of his *cestui que trust*. After an abandonment the insured becomes the agent of the insurers, and standing in that relation he cannot purchase, except with the consent of his principals. If he does, and the purchase is not sanctioned by the insurers, the abandonment is waived and annulled." See also, Vaughan *v.* Western Marine & F. Ins. Co., 19 La. 54.

In considering, whether the assured has a right to refuse to accept the vessel when bought by the master, the question as to the time when the abandonment was made may be important. If it is made while the loss continues total, it relates back to the time of the disaster, and the master is then the agent of the underwriters, and acts for them, so that the assured in such a case may well refuse to receive back the vessel when it is bought by the master. But if the assured, at the time of the sale, continued to be owner, it may be, that a purchase by the master, would be for his benefit. See Chamberlain *v.* Harrod, 5 Greenl. 420; Chesapeake Ins. Co. *v.* Stark, 6 Cranch, 268; Columbian Ins. Co. *v.* Ashby, 4 Pet. 139.

[1] See cases cited in the preceding note, also Brown *v.* Smith, 1 Dow, P. C. 349; Catlett *v.* Pacific Ins. Co., 1 Wend. 561, 1 Paine, C. C. 594. This principle would prevent the prosecution of a voyage after an abandonment from being necessarily considered as a waiver of the abandonment. Parker *v.* Towers, 2 Browne, App. 80.

[2] King *v.* Middletown Ins. Co., 1 Conn. 184. But if the insured, acting as such agent, sells the vessel, he waives his abandonment by acting as purchaser. Ogden *v.* New York Fire Ins. Co., 10 Johns. 177, 12 Johns. 25.

[3] See ante, p. 361, n. 1.

to abandon, and may be treated as the agent of the insured, yet they may disavow his acts. So, if a mortgagee is insured under such general terms, and the mortgagor, the nominal insured, abandons, and the mortgagee takes possession and sells the vessel, this is a repudiation of the abandonment.[1]

SECTION IX.

OF THE EFFECT OF AN ABANDONMENT.

It is a universal rule, that all rights, claims, and interests, which are indissolubly connected with the property insured, pass to the insurers by an abandonment of the property,[2] so far as the same belonged to the assured and to the extent of the interest covered by the policy.[3] As a right to contribution for general average;[4] all claims for negligence or any misconduct causing

[1] Marine Dock & Mutual Ins. Co. *v.* Goodman, Chancery Ct., Mobile, Ala. 4 Am. Law Register, 481.

[2] The owners of the vessel, therefore, after they have abandoned her, have no right of action against a person claiming to hold the vessel as vendee, under a sale by the master. Hooper *v.* Whitney, 19 La. 267.

[3] In Rice *v.* Cobb, 9 Cush. 302, the owner of a vessel mortgaged one half of her to one person, and subsequently mortgaged the whole to another person subject to the lien of the first. The last mortgagee insured his interest, and on a loss taking place, abandoned the vessel to the insurers. It was held, that only the interest of the insured passed, and that the first mortgagee was entitled to one half the salvage. See also, Phillips *v.* St. Louis Perpet. Ins. Co., 11 La. Ann. 459.

In Merchants' & Manufacturers' Ins. Co. *v.* Duffield, 2 Handy, 122, 4 Am. Law Register, 662; and in Cincinnati Ins. Co. *v.* Duffield, 6 Ohio State, 200, three fourths of a steamboat were insured. She was afterwards sunk and abandoned. The underwriters raised the vessel and realized from the wreck, after deducting expenses, the sum of three thousand dollars. The policy contained this clause: "In all cases of abandonment, the assured shall assign, transfer, and set over to said insurance company all their interest in and to the said steamboat, and every part thereof, free of all claims and charges whatever." It was held, that the abandonment transferred only the interest of the assured, so far as it was covered by the policy, and that the insured were entitled to recover one fourth part of the proceeds of the wreck. But see Cincinnati Ins. Co. *v.* Bakewell, 4 B. Mon. 541, 544.

[4] Sturgess *v.* Cary, 2 Curtis, C. C. 59; Walker *v.* United States Ins. Co., 11 S. & R. 61.

injury to the property, as for collision,[1] or for injury to goods;[2] or for any indemnity from a foreign government.[3] And the same rule applies where the government of the country to which the parties belong, grants letters of reprisal to obtain satisfaction from a foreign government for illegal captures, the underwriters who have paid for losses occasioned by such captures, are entitled to the benefit of the fund accruing from the reprisal.[4] But if the underwriters refuse to accept the abandonment and the loss is settled by a compromise, the right of claiming indemnity does not pass.[5] So, if no abandonment is made, but the loss is settled as a partial loss, the underwriters have no claim on the insured for any subsequent benefit derived from the adventure.[6] So, too, we should say, on the prevailing authorities and what seems to us the reason of the case, that a mortgagee must transfer to the insurers by abandonment, so much of the debt due to

[1] See Yates *v.* Whyte, 4 Bing. N. C. 272, where it was held, that the party in fault was liable for all the damage done, and could not deduct the sum which the injured party had received from the underwriters. This case proceeded on the ground, that the plaintiff would be considered as the trustee of the underwriters, although he brought the action in his own name, and on his own behalf.

[2] Atlantic Ins. Co. *v.* Storrow, 5 Paige, 285. The case of Church *v.* Shelton, 2 Curtis, C. C. 271, was brought by an insurance company in the name of the shipper, though this fact does not appear in the report of the case. And in Garrison *v.* Memphis Ins. Co., 19 How. 312, the underwriters who had paid for a loss by fire, were held to be subrogated to the rights of the insured to recover from the carriers, in whose possession the goods were burned.

In Mellon *v.* Bucks, 17 Mart. La. 371, the action was brought by the shipper of goods against the owners of the vessel, and the insurance company, in which the vessel and freight and the plaintiff's goods were insured, was summoned as trustee. The plaintiff had abandoned the goods, but the abandonment was not accepted, and the insurers had not exercised any acts of ownership over the goods. It was held, that by the abandonment the title to the property passed to the underwriters, and that the plaintiff could not maintain this action, as it could not be considered a suit for the benefit of the underwriters, since the plaintiff sought by summoning them as trustees, to take the money out of their hands.

[3] Comegys *v.* Vasse, 1 Pet. 193; Russel *v.* Union Ins. Co., 4 Dall. 421, per *Washington*, J.; Gracie *v.* New York Ins. Co., 8 Johns. 237. And in Rogers *v.* Hosack, 18 Wend. 319, it was held, that the *spes recuperandi* passed by the abandonment, although the loss had not been actually paid by the underwriters.

[4] Randal *v.* Cockran, 1 Ves. Sen. 98.

[5] Brooks *v.* Mac Donnell, 1 Younge & C., Exch. 500; New York Ins. Co. *v.* Roulet, 24 Wend. 505.

[6] Tunno *v.* Edwards, 12 East, 488; Goldsmid *v.* Gillies, 4 Taunt. 803.

him as is paid by the insurers.[1] An action at law to enforce a right which the insurer has acquired by subrogation, must, generally, be in the name of the party, whose place the insurer has taken.[2]

The salvage, of course, belongs to the insurers; but if it be encumbered by any charge or lien by a peril against which they have insured, they are of course answerable for this, and bear the loss. But if the salvage have burdens, charges, or liens upon it springing from perils which are not insured against, this must be the loss of the insured, who must discharge these burdens, or pay or allow to the insurers the sum they pay, or are bound to pay, by reason of these burdens.[3] They take the ship, by this abandonment, free from any lien for seamen's wages earned before the time from which the abandonment takes effect,[4] but are, of course, liable for wages earned afterwards, by labor on board the ship, because this is a service rendered to them, and in and about their property.[5]

We have seen, that the insurers take the salvage property subject to the charges and expenses incurred in saving it: and it seems, that this may exceed the value of the salvage and still

[1] See ante, p. 82–85.

[2] London Ass. Co. *v.* Sainsbury, 3 Doug. 245; Rockingham Mutual F. Ins. Co. *v.* Bosher, 39 Maine, 253. In equity, however, the insurer may sue in his own name. Garrison *v.* Memphis Ins. Co., 19 How. 312.

[3] See cases ante, p. 344, n. 3.

[4] In Frothingham *v.* Prince, 3 Mass. 563, it appears to be held, that if the owners pay the wages of the seamen they can look to the underwriters to reimburse them if there is any salvage from the wreck. But this decision, we think, is manifestly incorrect.

[5] In England, it does not appear distinctly, whether freight pending at the time of the loss, passes to the underwriter on freight or to the underwriter on the ship. It may, therefore, be a question, whether the underwriter on the ship is liable for wages earned subsequent to the loss, as these should be a charge on the freight. But, in this country, where the law is well settled, that subsequent freight passes by the abandonment of the ship, the underwriters are clearly liable for wages subsequently earned. Hammond *v.* Essex F. & M. Ins. Co., 4 Mason, 196. The voyage in this case had been pursued with the assent of the underwriters, and they had received the freight earned. In M'Bride *v.* Marine Ins. Co., 7 Johns. 431, the vessel was abandoned on account of being detained by an embargo, but the abandonment was not accepted. It was held, that the owner of the vessel, as the abandonment was not accepted, should have laid her up and discharged the crew, and as this was not done, it was held that the underwriters were not liable.

the insurers be bound, provided, the expenses and charges were incurred by the insured while laboring in good faith and with reasonable discretion for the recovery and security of the salvage and the consequent benefit of the insurers; for this they are authorized, if not required to do, by the usual policies of insurance, and would be, we think, by the principles and policy of the law of insurance, even if the policies contained no such provisions.[1]

If the insurers interpose and refuse to accept the salvage, and distinctly request that no more expenses be incurred on account of it; then the insured can no longer incur such expenses at their risk; there would seem to be, however, this qualification to this last rule, namely, that the prohibition must not be wanton and tending to expose property to unnecessary destruction, but must be made at least in good faith, and with some show of reason.[2]

[1] Barker *v.* Phœnix Ins. Co., 8 Johns. 307; Jumel *v.* Marine Ins. Co., 7 Johns. 412; Lawrence *v.* Van Horne, 1 Caines, 276; Potter *v.* Providence Washington Ins. Co., 4 Mason, 298; Le Cheminant *v.* Pearson, 4 Taunt. 367.

[2] Phillips *v.* St. Louis Perpetual Ins. Co., 11 La. Ann. 459. In Gould *v.* Citizens' Ins. Co., 13 Mo. 524, the underwriters refused to accept the abandonment, and afterwards compromised the claim. It was held, that they were, nevertheless, liable on a contract made by the master with a third party to save as much of the wreck as he could at a certain rate per cent. of salvage. If the vessel is captured, and the master, after an abandonment, acting as the agent of the underwriters, makes a compromise with the captors, the underwriters are obliged to pay as for a total loss, but are entitled to the benefit of the compromise. Jumel *v.* Marine Ins. Co., 7 Johns. 412. And in Miller *v.* De Peyster, 2 Caines, 301, the same rule was laid down in a case, where the compromise was made by a person appointed by the master to look after the property insured.

In Lawrence *v.* New Bedford Comm. Ins. Co., 2 Story, 471, the jury found that there was a total loss of the property insured at an intermediate port, and the question was as to the effect to be given to the acts of the master in respect to the salvage. The master remained at the intermediate port for four months, to take charge of the property, a cargo of oil, and then sold part of it and shipped the remainder to New York, via Rio Janeiro. He embarked with it, and at Rio caused it to be unladen and sold, and the proceeds invested in coffee, which was carried to New York and there sold with the consent of the underwriters. The coffee was somewhat damaged on the voyage. It was held, that the captain's necessary expenses at the intermediate port, in taking care of the property insured, and until its shipment on board the vessel, together with a reasonable compensation for his services, were a charge on the underwriters; and that they would be liable for the price of his passage to New York, if his accompanying the oil was a reasonable and prudent act for the benefit of the underwriters. In regard to the sale at Rio, the court held, that generally the master has not the right to dispose of

Generally, if the abandonment be valid, the property is thereafter at the risk of the insurers, who must be liable for the acts of those employed upon it, so far, at least, that any loss caused by these persons, is their loss. The master and crew become by abandonment the agents or servants of the insurers for this purpose; and as the insurers bear the risk of their conduct,[1] so they are entitled to all the benefit which may arise from it; and even after condemnation by a prize court, the master or whoever is in charge of the property, remains so far the agent of the insurers, that if he purchases the property at the sale, avowedly for himself, the insurers may adopt the purchase as made for them by their agent.[2] So too, the owner of the property becomes by the abandonment, the agent and trustee of the underwriters, so far, that it is his unquestionable duty to do all that he reasonably can, for the preservation of the property, and its safe arrival into

the property and to invest the proceeds in another adventure. There must either be a necessity for it, or it must be, with reference to the voyage and the nature of the property in a very high degree expedient.

[1] In Lawrence *v.* New Bedford Comm. Ins. Co., 2 Story, 471, cited in note *supra*, Mr. Justice *Story* said, assuming the sale of the salvage not to have been necessary, "If it turns out to be advantageous to the parties interested, and they adopt the acts of the master, and receive the property without reserve or objection, that will amount to a ratification, and they must then take the property or its proceeds *cum onere*. If, on the other hand, they receive the property, or its proceeds, reserving all their rights, and waiving no objections, then they are entitled to receive the proceeds without any charges upon them, if the proceeds do not yield a profit to them beyond the fair value of the property shipped, and so improperly converted, as it would have been on its arrival at the original port of destination. But if a profit ultra such value has come to the hands of the underwriters, by reason of the new investment, then I think, that if the master has acted without fraud, and under a mere mistake of judgment, he ought to be entitled, out of those profits, to receive his reasonable expenses, and also a reasonable compensation for his services, not exceeding those profits."

[2] United Ins. Co. *v.* Robinson, 2 Caines, 280. In this case insurance was effected on goods. The vessel was captured and carried into Malaga, where the consignees purchased the cargo from the captors for $15,565, and afterwards sold it for $30,174, and invested the proceeds in wines and brandies which they shipped on the account and risk of the defendants, who received the goods and claimed to retain possession of them, notwithstanding they had, on notice of the capture, made an abandonment to the insurers which had been accepted. The consignees testified that they acted as agents of the defendants and should have looked to them in case of loss. The court held, that by the abandonment the underwriters had the right to adopt the acts of the consignees, and having done so, were entitled to the proceeds of the goods which the defendants had sold. This case was affirmed on appeal. Robinson *v.* United Ins. Co., 1 Johns. 592.

the hands of the insurers.[1] But the insurers cannot be made liable to him, or liable to lose in an adjustment with him, for mistaken or wrongful acts committed by himself. They might be thus liable for the acts of a person expressly and in good faith made agent of the insurers for the property by the insured;[2] but they would not be, as it seems, for the acts of one who was acting as the agent of the insurers by reason of his previous relation to the insured, as factor, consignee, or master; for if the property is lost by his fraud, the owner must allow or account for it in the same way, as if it had been lost by his own act; for as to these he will be considered as the agent of the insured.[3]

The general rule is, that the abandonment relates back to the time of the loss, but it would seem that though the underwriters would be liable for the acts of the master, or any other person having the possession and control of the property during the time intervening between the loss and the abandonment, provided such acts were *bonâ fide*,[4] yet they are not liable for the fraudulent acts of such agent, until the abandonment takes effect.[5]

[1] Curcier *v.* Philadelphia Ins. Co., 5 S. & R. 113, 116, per *Tilghman*, C. J.

[2] Miller *v.* De Peyster, 2 Caines, 301; Gardiner *v.* Smith, 1 Johns. Cas. 141.

[3] Smith *v.* Touro, 14 Mass. 112. In this case, the vessel was insured from Havana to Boston or port of discharge in the United States not blockaded. The policy contained a clause, that in case of capture the assured should claim and prosecute for the property until acquittal, or condemnation in a high court of admiralty, the underwriters and assured agreeing to pay their proportion of expenses in such a case. The vessel was captured and taken into Halifax and abandoned, but was subsequently restored to the master, who represented himself as the Spanish owner, and he then took a cargo to the West Indies without the authority of the real owner or of the underwriters; and converted the property to his own use. It was contended, that the property having been abandoned while in the hands of the captors, the acts of the master were at the risk of the underwriters. But the court held, that as the abandonment was made while the ship was under merely a temporary restraint, and as no injury was sustained by the property, the assured could not recover for a total loss on that ground, and that the further acts of the master must be considered as done by him as agent of the insured.

[4] Lawrence *v.* New Bedford Comm. Ins. Co., 2 Story, 471, 479. In Gardere *v.* Col. Ins. Co., 7 Johns. 514, the neglect of the master to put in a claim for the vessel, after she was captured, seems to have been considered as the act of an agent of the underwriters, though the vessel was not abandoned till after the condemnation.

[5] Dederer *v.* Delaware Ins. Co., 2 Wash. C. C. 61.

ested in it, are persons who represent the original losers by having insured them.

In this chapter, it is not necessary to consider anew the general principles of the law of average, for they are unaffected by entering into relation with those of insurance. But to present the qualifications of the law of average, or rather the new and peculiar questions in relation to it, which are brought up by the application of these principles to parties who were not the original losers. And of the principles themselves, we shall say only so much as our present purpose requires.

For this purpose we must state briefly the general object of the law of average. It is to divide an actual maritime loss, among all, whose loss it really and substantially is and ought to be. For example, many and diverse interests being involved in a common peril, from which escape is possible only by the voluntary sacrifice of one of them, if this sacrifice is made, and thus the peril is avoided by all the rest, it is plain that it must be considered the sacrifice or loss of all involved in the danger, and an escaping from it by the sacrifice which the good of all required. And this simple rule is the foundation of the law of general average, which we may say is as old as maritime commerce, not merely because it rests on principles of which the need must come early, and the justice and expediency are always obvious, but on the evidence of those earliest records which have crumbled under the influence of time, and come down to us only in fragments.

We must further remark, that the reason and the efficacy of this law of average, require that three things should be considered as absolute essentials, without the concurrence of all of which, no maritime loss can be a general average loss. The first of these is, that the loss must be a voluntary and intended sacrifice. For if a loss occur which is not the result of a free choice, it may benefit others, but nevertheless give no claim against them for contribution. This claim rests always on the supposition, that the party advancing it has, for the benefit of others, undergone a loss which he might have refused to suffer.

The second is, that the sacrifice was necessary, or at least that there was an actual appearance that otherwise all would perish, and a rational possibility at least, that by the sacrifice of a part, the rest might be saved. For without this, the loss

was only a wanton, or a foolish destruction of property; and upon an act like that no one could ground a claim for indemnity; although the party suffering the loss might have a claim against the master, to whose fault it was owing, or against those who employed him.

The third is, that the sacrifice must be successful; that is, it must save other property. For, however well intended or meritorious it may be, the claim for contribution is not founded upon the moral quality of this act, but upon its beneficial effect. At its own expense, one interest has saved other interests. Therefore it shall be at the expense of the other interests also. Hence, the rule that nothing but what is saved contributes. By this is meant what is ultimately saved; and therefore from this contributory value must be deducted all subsequent losses, or averages, or other expenses which are necessary to the safety of the property or interests contributing.

These three essentials have already been stated, in a somewhat different form, in a preceding chapter; and there illustrated in detail.[1] Here we pass to the way in which insurance becomes connected with average.

The first remark we make is, that the law of general average, and each case or question of average, is generally the same whether it does or does not come into relation with insurance. The only question proper to the law of insurance in this behalf being whether the insurer or the insured shall bear the loss. But in many of these cases, there is a previous question, which is, whether there be any average loss at all, or what the loss is; for if there is a loss the insurers certainly must pay it. And this is very frequently the first and only question that is tried, the insurers merely taking the place of the insured.

The general rule is, that a loss by general average, is a maritime loss, for which insurers are responsible. The two limitations of this, which, if not the only ones, are at least the most important, are, first, that insurers are answerable only when they have insured the very thing, or interest, which is called upon to contribute to an average loss. If they insured the thing which was itself sacrificed, they are as liable to pay for it as

[1] See ante, Vol. I. p. 288, n. 1.

if it were not an average loss, that is, as if it were a common loss by a peril of the sea. But by paying it they possess themselves of all the claims for contribution to which the sacrifice of the thing entitled the owner of it.

The other limitation is, that insurers are responsible only when they have insured against the very peril or cause of loss which made the sacrifice necessary. The reason is this. The whole purpose and effect of average is to equalize the loss; to spread it over all the interests; but the nature of the loss remains unaffected. Thus, if we suppose that insurers have insured the cargo of A against all perils, etc., excepting fire. Then a fire breaks out, and some part of the vessel, its sails, or rigging, is destroyed at once to extinguish the fire or prevent its spreading; and it saves the rest of the property. To this the cargo must contribute, and A pays his contribution in money. He cannot call on the insurers, for the theory of general average is, that A's loss is as much and entirely a loss by fire, as if his own goods, instead of the ship-owner's, had been destroyed. And he is not insured against a loss by fire. Or, to take another illustration, A's cargo is insured by a common policy, but an additional clause is inserted, "excepting all war risks." The ship and cargo are captured by an enemy, and taken into port, and after much expense the master succeeds in obtaining their liberation. The owner of the cargo will pay his share; but the loss he thus sustains is a loss by a war risk, and that is expressly excepted.

One question under the law of average, which can arise only when insurers are a party to the case, is whether the insured, if he has a claim against others for contribution, is bound to make that claim before he calls on the insurer. If so, his demand against the insurer is less by the exact sum he receives from the contributors. If he does not first enforce this claim, and the insurers pay him all that he has lost, the insurers become thereby possessed, for their own benefit, of the claim for contribution. It might, therefore, seem to be the same thing in effect and amount, whether the insured collects or transfers his claim. But circumstances may make it a very different thing.

If, for example, the contributors are insolvent or cannot be reached, and the lien of the party entitled to contribution, has not been enforced against the contributory property; here the

claim is valueless. If the insured can demand his whole loss of the insurers, it is they who lose the value of the contributory claim. If he must enforce this claim first himself, and demand of the insurers only the balance, he loses this value. On this point, it seems now to be well settled, that the insured may claim of the insurers his whole loss, transferring to them his claim for contribution.[1]

It would seem, however, that there must be this qualification to the rule. If the claim for contribution, which would belong to the insurers by their payment of the loss, be of no value, or of lessened value, and this loss or diminution of value has been caused in any way by the negligence or fault of the insured, he must bear this loss, and must allow the insurers for the amount in the same way as if he had collected it.

Practically, therefore, the result is this. The insured, although not *bound* to collect his contributory claim before a ling on his insurers, usually does this if he can; and he may claim his whole loss of the insurers, leaving to them this contributory claim, whatever may be its value, provided he has not, by refusal of a tender or some other similar act of his own, lessened that value or prevented its recovery.

Another question arises under the American rule which makes a loss of more than fifty per cent. of value, a constructive total loss. If, for example, the immediate loss is sixty per cent., and there is a claim of contribution for twenty per cent., it may be said that the actual loss is but forty per cent., which is not enough to make it constructively total. In a previous chapter, on total loss, it was remarked, that if the contribution was not received by the insured, it might be disregarded; but if actually paid, only the balance of loss under such payment should be considered. This would seem to give to the insured, not only the option of making it a total loss or not, but to give him the

[1] Maggrath *v.* Church, 1 Caines, 196; Watson *v.* Marine Ins. Co., 7 Johns. 57, 62; Amory *v.* Jones, 6 Mass. 318; Faulkner *v.* Augusta Ins. Co., 2 McMullan, 158; Hanse *v.* New Orleans Marine & F. Ins. Co., 10 La. 1. See also, *dicta* to this effect by *Story*, J., in Potter *v.* Providence Washington Ins. Co., 4 Mason, 298, and by *Shaw*, C. J., in Greely *v.* Tremont Ins. Co., 9 Cush. 415, 419. See also, cases in the next note.

power of making that a total loss by construction, which was, in fact, but a partial loss. A case may easily be supposed of an owner of a small part of the cargo, losing something more than half by a sacrifice which gave him a claim for nearly complete indemnity. But by this rule, he would have a right to make it a total loss by construction. This would seem to be objectionable; but the rule is well sustained, and upon the whole is reasonable.[1]

If an insured ship be run down and loses more than half of her value by the negligence of another ship, which is bound to make indemnity, there seems to be no doubt that the owner of the insured ship may abandon her, transferring the claim for indemnity to the insurers. So, if she be captured and condemned, under circumstances which give a valid claim for indemnity against some party or government, here too there could certainly be an abandonment, with transfer of claim. And the claim for average contribution seems to be analogous in principle to these.

This rule gives, in fact, to the insured only a full indemnity, and inflicts no especial hardship on the insurers. For they pay the whole value; but they received by abandonment all of the property that was left, and also the whole claim for contribution, thus losing only what was really lost by the sacrifice.

It should be noticed, however, that if the insured who has lost property, and by the loss acquired a claim to contribution, is also the owner of other property which is bound to make contribution, and is not insured, or not by the same insurers, he cannot require of the insurers to pay him his whole loss and then come back on him and collect from him his contributory claim, for this would be to demand of them what they owe him, without deducting what, by their payment, he owes to them.[2] He must first deduct what is thus due from himself for contribution, and,

[1] Moses *v.* Col. Ins. Co., 6 Johns. 219; Forbes *v.* Manufacturers' Ins. Co., 1 Gray, 371. In Lapsley *v.* Pleasants, 4 Binn. 502, a contrary rule was laid down, and it was held, that the insured must, at least, make a demand on the owners of the subjects bound to contribute, before seeking to charge the underwriters with the whole loss.

[2] Potter *v.* Providence Washington Ins. Co., 4 Mason, 298; Jumel *v.* Marine Ins. Co., 7 Johns. 412. See also, Williams *v.* London Ass. Co., 1 M. & S. 318.

we should say, but without direct and specific authority, that he must make this deduction, *although* it reduces his loss below fifty per cent., and thus prevents it from becoming total by construction.

The other American rule we have spoken of, which requires a deduction from new repairs of one third, to reduce them to the value of the old materials, applies also to an average loss upon the ship, so far as insurers are concerned. That is, if there be an injury to the ship by voluntary sacrifice, calling for contribution, as by cutting away the masts and rigging, and the insurers on the cargo are called upon to contribute, in order to ascertain the amount of damage for which contribution is to be made, one third is to be deducted from the cost of the repairs or renewal, whether actually made or only estimated.[1]

The premium of insurance adds, if paid, to the cost of whatever property is insured; and if not paid it may be considered as adding to its value. The question has been raised whether the premium should not, for this reason, be added to the contributory value of ship, or cargo, or freight. It seems to be the better opinion that it should not be so added.[2]

We have already seen that the parties frequently agree to value the property insured at a specific sum in the policy. But it seems to be quite well settled that such a valuation is to be disregarded, or only used as matter of evidence as to actual value, in a case of general average. If, for example, a ship is called on to contribute for jettison of cargo, and the question arises as to what shall be her valuation for this purpose, this is in the first place a question between the owner and the shipper; and it is plain that the shipper ought not to be prejudiced, or affected, by any bargain between the owner and the insurer, for he has no interest in it, and no control of it. It follows, then, that the actual value of the ship must be taken, irrespective of the agreed value. And when the owner has paid his twenty per cent. or other proportion on this value, and demands repayment of the insurer, the insurer has no right to say to him,

[1] Stevens & Beneeke on Av., Phillips's ed. 147, note, 238.
[2] See 2 Phillips on Ins. § 1362.

your ship was valued for average at twenty thousand dollars; but we have agreed to value it at ten thousand dollars, and therefore I shall pay but one half of your contribution. For if the vessel had been valued at ten thousand dollars, the whole contributory value would have been less, and consequently the percentage of contribution more; nor could this be readjusted and corrected, without opening and recalculating the adjustment of average. And, on the whole, it may be regarded as the prevailing rule, that the valuation in the policy has no effect upon the adjustment of average; or, in other words, that losses under open and under valued policies are adjusted alike, so far as relates to general average, not only as regards the original parties, but as between any of them and their insurers.[1] As the question whether or not there is a general average claim, depends entirely upon the existence of the elements which we have before mentioned, it makes no difference in respect to the liability of the insurers of the ship that there are no contributory interests on board.[2]

In our chapter on general average, we remarked that there were many expenses which were properly settled in the same way and proportion as general average expenses, and were so called; but yet were not such, strictly speaking. They are, in fact, expenses of all the parties, by their agent who derives authority to make them from his office and from the exigency. He therefore binds all for whom he acts; and among them the insurers of the property. And this not only after abandonment and acceptance, which make the insurers as much owners as they would be by purchase, but before. For they bind the owners, and as the owners thus lose the money, they in their turn may call on the insurers. It must, however, be remembered, first, that the insurers cannot be called on unless the damage or other cause of the expense, was the result of a peril against which they had insured. And it is often necessary in an adjustment where some of the property or interests in peril were insured, and

[1] Clark v. United F. & M. Ins. Co., 7 Mass. 365; 1 Magens, case xix. The practice is said to be different in New York. 2 Phillips, Ins. § 1410.

[2] Potter v. Ocean Ins. Co., 3 Sumner, 27; Potter v. Providence Washington Ins. Co., 4 Mason, 298; Greely v. Tremont Ins. Co., 9 Cush. 415.

some part was not, to indicate what contribution is necessary from this thing or that thing, and for this cause or that cause, so that the liability of the insurers may be accurately measured. Nor are the insurers liable, unless the exigency or circumstances warranted the master in making the expense; for although if the master spends the owner's money without authority or just cause, they lose the money, this is not a loss against which the insurers, generally at least, insure the owner. The good or ill conduct of the servant of the owner, chosen and employed by him, should, for obvious reasons, be at his risk.

It has also been said, that an adjustment of general average, made at a port where it ought to be made, and made according to the laws of that port, and in good faith, binds conclusively all who are parties to it.[1] This is certainly true, and for obvious reasons which we formerly stated, so far as relates to the original parties to the average, or to the owners of the several sacrificed or contributory interests. But when this question comes up in reference to them who are only indirectly interested, by insuring those who are so directly, it assumes a somewhat different aspect. The contract of insurance is made between parties, one of whom at least, and that the promising party, has a permanent location; there he enters into the contract, and makes his promise. And has he not the right to have it construed and applied in all respects, by the law of the place where the contract is made and is to be performed? If a New York ship, bound to Calcutta, is insured in London, and incurs great expense by seeking a port wherein to repair damage caused by a sea peril, there may be three laws, or rules, by which to determine how much the ship, or the insurer of the ship, shall pay. The law of New York, for example, in respect to the wages and provisions and expense of repair, may be one thing, that of London another, that of Calcutta, a third. And if we admit, as is certain, that an adjustment made on arrival at Calcutta will bind ship, cargo, and freight, when the ship-owner comes to London to obtain indemnity from the insurers, may they not say, we insured you under the law of England; by that law the loss of the ship would have been far less than it is by the adjustment at Calcutta?

[1] See ante, Vol. I. p. 332.

This difference must be your loss, because we shall pay you by the law of London.[1]

It is not to be denied that there is some plausibility in this view, and that it is sustained by respectable authorities. We cannot, however, doubt that the opposite rule is the true one; and the weight of authority, as well as of reason, would hold the insurers as among the parties upon whom a foreign adjustment, properly made where made, is binding. The contract of insurance is eminently a maritime contract. It goes with the ship. The insurers can calculate this risk, for the policy is made upon a designated voyage, or upon time, or with a liberty of procedure agreed upon, and the insurers ought, by a familiar principle of the law-merchant, to be governed by the law of whatever place becomes applicable to the interests insured in the course of the voyage or of the time. The fault is in the diversity of these rules; this is less than it was; and the present strong tendency of the law-merchant to vindicate itself as part of the *jus gentium* and to cast off local peculiarities, permits the hope that this, and some similar questions, will disappear.[2]

[1] In Power *v.* Whitmore, 4 M. & S. 141, an adjustment was made at Lisbon, and wages and provisions were included, which was contrary to the law of England. It was held that the contract was to be construed according to the laws of England, unless the parties were understood as having contracted on the footing of a different known general usage in the country where the adventure was to terminate. There being no evidence of such usage, except the decree of the court, the plaintiff was nonsuited. In Lenox *v.* United Ins. Co., 3 Johns. Cas. 178, a cargo of pipe staves was insured. Some of them were carried in the hold, and others on deck, with the consent of the insurers. The part on deck was jettisoned, and according to an adjustment made at Lisbon, the cargo in the hold was charged with its proportion of the loss. It was held that the underwriters were not liable for the general average loss. So in Shiff *v.* Louisiana State Ins. Co., 18 Mart. La. 629, where a loss by carrying a press of sail to keep off a lee-shore, was contributed for in general average at Hamburg, it was held that the underwriters were not liable.

[2] Walpole *v.* Ewer, Park, Ins. 565. In Newman *v.* Cazalet, Park, Ins. 566, the commercial court at Pisa, adjusted the loss by charging the cargo at its full value, the ship only at one half and the freight at one third, and also charged the wages and provisions of the seamen while in port. In an action against the underwriters, *Buller*, J., charged the jury as follows: "On the general law, the plaintiff would fail; but in all matters of trade, usage is a sacred thing. I do not like these foreign settlements of average which make underwriters liable for more than the standard of English law. But if you are satisfied it has been the usage, upon the evidence given, it ought not to be shaken."

A distinction is made between the liability of the insurers where the property sacrificed would not by the law of the place where insurance was made be contributed for

There is, however, one exception, or rather one apparent exception to this rule, which rests, so far as authority is concerned, on one case only. This exception occurs, when there is a general average loss which is adjusted abroad, and in that adjustment certain contributory claims are denied to the party suffering the loss, which claims would be allowed to him at home. When he returns and demands indemnity of the insurers, they cannot say that his whole loss was adjusted abroad, and that this adjustment of the loss is conclusive against the insured; and that he cannot demand indemnity from them for any items of loss, denied him by that adjustment. Thus, if an American ship puts into a foreign port for repair or refitting, by reason of sea damage for which the insurers are responsible, and the wages and provisions from the time of bearing away until the repair is made, should go into average by the American rule, but do not by the rule where the adjustment of the loss is made, yet in applying the policy to the case, at home, these wages and provisions will be considered as properly an average loss, and the insurers will be held to pay the ship's proportion of them.[1]

We shall however speak, hereafter, of the adjustment of a policy of insurance, generally.

in general average (see cases in preceding note), and their liability where the adjustment is made up in a different manner at the place of the contract, and the port of distress. In the latter case the underwriters have been held liable. See Strong *v.* New York Firem. Ins. Co., 11 Johns. 323; Depau *v.* Ocean Ins. Co., 5 Cow. 63; Loring *v.* Neptune Ins. Co., 20 Pick. 411. But there seems to be no valid reason why the insurers should not be as liable in the one case as in the other.

[1] Thornton *v.* United States Ins. Co., 3 Fairf. 150. There seems, however, to be no reason why the adjustment should be binding when it is in favor of the insured, and not binding when it is in favor of the underwriter.

CHAPTER XII.

OF PARTIAL LOSS.

THIS is often called particular average; but this phrase is so obviously inaccurate, that, although sanctioned by very frequent use, we prefer to employ the other.[1] As a partial loss differs from a total loss, because it is a loss of a part and not of the whole, so it differs from a general average loss, in that it does not give any claim for contribution on other interests.

The insurers of the interest partially damaged, are liable under somewhat different rules in reference to different interests.

For repairs on the ship they are liable, although the old parts were deteriorated by age and decay, the vessel being seaworthy,[2] the deduction of one third, new for old, meeting all this question, whatever be the youth or the age of the ship;[3] and

[1] See ante, Vol. I. p. 284, n. 1.

[2] Fisk *v.* Commercial Ins. Co., 18 La. 77; Depeyster *v.* Col. Ins. Co., 2 Caines, 85; Depau *v.* Ocean Ins. Co., 5 Cow. 63.

[3] In England, it is not customary to make this deduction of one third, new for old, when the ship is new and on her first voyage. Weskett, tit. Repair, n. 1. Some question has arisen, whether a voyage out and home is to be considered as one voyage within this rule. See Fenwick *v.* Robinson, 3 Car. & P. 323; Pirie *v.* Steele, 8 Car. & P. 200, 2 Moody & R. 49. In Thompson *v.* Hunter, cited 2 Moody & R. 51, insurance was effected in Dublin for a voyage from the Humber to the Baltic and back. The insured relied on a usage which prevailed on the Humber to consider all vessels as new until they were twelve months old; but the court held, that this usage could not be set up, as the policy was an Irish one. In Poingdestre *v.* Royal Exch. Ass. Co., Ryan & M. 378, a vessel, ten years old, had been thoroughly repaired and was afterwards damaged, chiefly in the part which had been repaired. The insured was about to call witnesses to prove a usage, to consider a vessel which had been thoroughly repaired, as a new vessel, but *Best*, C. J., said, that as the jury was a special one, they were competent to judge of the usage, and whether any existed, and instructed them

whether the repairs are more or less expensive at the place where they are properly made;[1] and the repairs are to be made and the new work added in a style conformed to the original style and character of the ship.[2] The liability of the insurers extends to any extraordinary expenses necessarily incurred in consequence of a peril insured against,[3] as in raising funds for repairs;[4] but not to the expense of wages and provisions of the crew while employed on the repairs;[5] nor while the vessel is detained,[6] as by an embargo.[7]

that the general rule should govern, unless they saw something in the case to take it out of that rule.

In this country, one third is deducted in all cases, whether the ship is old or new. Nickels *v.* Maine F. & M. Ins. Co., 11 Mass. 253; Sewall *v.* United States Ins. Co., 11 Pick. 90; Dunham *v.* Commercial Ins. Co., 11 Johns. 315. See also, cases ante, p. 354, n. 1. But in Fireman's Ins. Co. *v.* Fitzhugh, 4 B. Mon. 160, it was said, that the rule of one third off, new for old, proceeded on the ground that the vessel was improved by the repairs, and it was doubted, whether it would apply to steamboats, which were not considered as improved by repairing.

[1] See ante, p. 358, n. 1.

[2] Center *v.* American Ins. Co., 7 Cow. 564, 4 Wend. 45.

[3] Thus, if a vessel is obliged to be towed into port for repairs, the expense of this constitutes a particular average, if done for the benefit solely of the subject insured. Perry *v.* Ohio Ins. Co., 5 Ohio, 305. So also, in regard to the expense of navigating a ship from one port to another, for the same purpose. Lincoln *v.* Hope Ins. Co., Sup. Jud. Ct., Mass., March T., 1857. So, if a vessel runs ashore, the expense of launching it is to be borne by the underwriters. Dix *v.* Union Ins. Co., 23 Mo. 57. An insurance on a ship "while being safely launched," covers all expenses necessarily incurred in saving the ship from actual injury, to which she was exposed through no fault or mismanagement on the part of the persons engaged in launching her. Frichette *v.* State Mutual F. & M. Ins. Co., Sup. Jud. Ct., New Hampshire, June, 1858, 21 Law Reporter, 359.

[4] Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456, 469.

[5] In Hall *v.* Ocean Ins. Co., 21 Pick. 472, the vessel, insured on a time policy, on a voyage from Frankfort, in Maine, to Porto Rico, was compelled to put into Bermuda to be repaired, and was there sold by the master. On the trial before the jury, the judge ruled, "that in a policy on time, where a vessel proceeds to a port of necessity, the clause providing that wages and provisions shall go to the general average only, applies to such charges only as accrue up to the time when the general average ceases, by a sale or other disposition of the cargo; that a reasonable allowance for portage bill,

[6] Even though the vessel is insured on time. Gazzam *v.* Cincinnati Ins. Co., 6 Ohio, 71; Gazzam *v.* Ohio Ins. Co., Wright, 202. See also, preceding note, and ante, Vol. I. p. 296.

[7] M'Bride *v.* Marine Ins. Co., 7 Johns. 431.

The various questions presented by this rule of one third off, new for old, are not yet entirely settled. On the continent of Europe, the one third is deducted merely from the materials and not from the labor, differing in this respect from the law of England, and of this country.[1] The rule is general in respect to the deduction of the one third from the materials, the only exception in practice being an anchor, all other iron work being subject to the deduction.[2] In some places, the third is deducted from dockage, moving the vessel, and such other incidental expenses

including wages and provisions of officers and crew, for such reasonable time as would be requisite to make the repairs, should be allowed as part of the cost of repairs." This ruling was held to be incorrect, and it was held, that the wages and provisions of the officers and crew, while the vessel was undergoing repairs, were not to be computed as part of the particular average, but as it would be necessary that some person should be employed on the part of the owner to superintend the repairs, this charge was to be considered as for part of the labor employed in the reparation. The court also said: "But the services of the officers and seamen might be rendered by them as laborers in making the repairs; and in such case, their labor would be chargeable, just as if other laborers had been employed to make the repairs." On the authority of this *dictum*, Mr. Phillips says: "It has been distinctly *held* in Massachusetts, and this seems to be the better doctrine, that the labor of the crew in repairing damage occasioned by the perils insured against is chargeable to the underwriters." 2 Phillips, Ins. § 1429. We are not able to see, that the point has been so *held* in Massachusetts; and the authorities generally, are certainly the other way. In Giles *v.* Eagle Ins. Co., 2 Met. 140, where the crew assisted in company with others in getting the vessel, which had been stranded, off, it was not pretended that the underwriters were liable for the wages, etc., on the ground that these items were a particular average, but the insured endeavored to include them among the general average charges. In Sage *v.* Middletown Ins. Co., 1 Conn. 239, where the master and crew assisted in making the repairs, the court held, that the underwriters were not liable, as the crew, not having been discharged, were obliged to do what they could in preventing and repairing the mischiefs incident to the voyage. So held also, in Perry *v.* Ohio Ins. Co., 5 Ohio, 305. In Fireman's Ins. Co. *v.* Fitzhugh, 4 B. Mon. 160, it was held, that where a steamboat was sunk and raised and carried into port for repair, and this was done for the benefit of the vessel alone, the expenses were to be adjusted as a partial loss, and that the underwriters were liable for them, including the wages and provisions of the crew.

[1] Stevens & Benecke on Av., Phillips's Ed. 385, 386.

[2] Mr. Benecke states, "that anchors are considered as not losing in value by being used, and no deduction is made from their cost price. But all other iron work is subject to the deduction of one third." Stevens & Benecke on Av., Phillips's Ed. 386. In Brooks *v.* Oriental Ins. Co., 7 Pick. 259, 269, it was held, that one third was to be deducted from the expense of a new iron strap for a dead eye. *Putnam*, J., said: "We do not know any thing excepted from the rule of one third, new for old, but an anchor. Perhaps, it may be true, that an old anchor which has been proved is better than a new one."

as seem distinctly connected with the repair.[1] And it should be deducted from the extraordinary expense of raising funds.[2]

Whether the value of the old materials should be deducted from the cost of repair, before the one third is deducted, may not be settled by authority; but, in our judgment, it should be deducted before; that is, it should be applied, either by a direct use of the materials, or by a deduction of their value from the cost of repairs, and then two thirds of the balance only should be charged to the insurers.[3]

[1] This is stated by Mr. Phillips to be the custom in Boston. 2 Phillips, Ins. § 1432. In Potter *v.* Ocean Ins. Co., 3 Sumner, 27, 45, it was held, that one third was not to be deducted from the amount of the expense of towing the vessel across a river to a ship-yard, for the purpose of repairing her, and that of assistance in getting her across and boat hire, and that of towing her back. *Story*, J., said: "In regard to the deduction of one third, new for old, the true interpretation of that rule has always appeared to me to be, that it is strictly applicable only to labor and materials employed in the repairs, and to the new articles purchased in lieu of those which were lost or injured by the disaster. It would be strange to apply it to other independent expenses, which were merely incidental to the loss; for in no just sense can it be said, that the owner is benefited thereby, or that he receives an enhanced value therefrom, beyond his indemnity."

In Sewall *v.* United States Ins. Co., 11 Pick. 90, the head note states, that one third is not to be deducted from the expense of raising a submerged vessel. But it does not clearly appear, from the report of the case, that this point was decided.

[2] The deduction was made in such a case, in Orrok *v.* Comm. Ins. Co., 21 Pick. 456. In Depau *v.* Ocean Ins. Co., 5 Cow. 63, the vessel was insured on a voyage at and from Havana to Rotterdam. She put into Halifax in distress and was there repaired, and part of the cargo was sold to pay for the repairs. *Savage*, C. J., said: "He (the insured) is entitled to the amount expended for repairs, deducting one third, new for old; and also, the difference between the price for which the sugars sold at Halifax and what they would have sold for at Rotterdam." It would seem from this that one third was not to be deducted from this latter amount.

[3] This is so held in New York and Massachusetts, and it seems to us to be founded upon principles of justice and indemnity to the insured. The only question is, as to the cost of repairs. The old materials have never passed to the underwriters, consequently, they are not entitled to derive any benefit from them, and the one third should be deducted from the balance remaining after deducting the old from the new materials. Byrnes *v.* National Ins. Co., 1 Cow. 265; Brooks *v.* Oriental Ins. Co., 7 Pick. 259; Eager *v.* Atlas Ins. Co., 14 Pick. 141. See also, for a discussion of this question, 5 Am. Jurist, 252; 6 id. 45. In Giles *v.* Eagle Ins. Co., 2 Met. 140, 144, *Putnam*, J., said: "In regard to the repairs made at Gloucester, one third should be deducted, new for old. And this is to be made from the gross amount, as was settled in Brooks *v.* Oriental Ins. Co., 7 Pick. 259." But in this case, as we have seen, the deduction was not made from the gross amount, but from the balance remaining after deducting the value of the old materials, and the word "gross" is probably a misprint for "net."

This question sometimes becomes of great importance. Thus, if a sea peril makes a recoppering of the vessel necessary, and the cost will be $9,000, and her old copper is worth $3,000, we should say, that this should be first deducted, leaving $6,000, for two thirds of which, $4,000, the insurers would be liable. The other rule would be for the insurers to say, that they are liable for $9,000 less one third, that is for $6,000, and the old copper is ours by way of salvage, and as this is worth $3,000, we are, in fact, liable only for the balance, or $3,000.

The rule of the deduction of one third, has been held to be limited to the case where the vessel comes into the possession of the insured after she is repaired.[1] But this must depend upon the fact, whether it was the fault of the insured or of the underwriter that the vessel did not come into the possession of the insured.[2]

If an owner effects insurance on a part only of the value of the property insured — as if for $5,000 on a ship valued at $10,000, he is insured for half, and is his own insurer for the other half. Thus, if there be a loss amounting, after one third is deducted, to $2,000, one half of this is the loss of the insurers, and one half is his own loss.[3]

We have already considered most of the questions which spring from the duty of the master, in case of wreck, to transship and forward the goods, if he can; and his right to hold the goods for this purpose. But the question still remains, whether, if the goods are sent forward at an increased freight, the underwriter on goods or the underwriter on the freight is responsible. As a general rule, it may be said, that underwriters on goods have nothing to do with freight.[4] But to this rule, there must

[1] Da Costa *v.* Newnham, 2 T. R. 407.

[2] Humphreys *v.* Union Ins. Co., 3 Mason, 429. See also, cases cited ante, p. 360, n. 1 and 2.

[3] Stewart *v.* Greenock Marine Ins. Co., 2 H. L. Cas. 159. See also, cases *passim*.

[4] Per Lord *Mansfield*, C. J., in Baillie *v.* Modigliani, 2 Marsh. Ins. 728. The vessel in this case, had been captured, condemned, and sold, together with the cargo. On appeal, the decree was reversed and the net proceeds of the sale were ordered to be paid over to a person who was the agent of the shipper of the cargo and of the owner of the ship. This person paid the owners of the ship a *pro rata* freight, and the owner of the cargo sought to recover this sum from his underwriters. But the court held that, although a *pro rata* freight was due, yet as between the insured and the underwriters

be an exception. We should state it thus. If the goods are sent on for the benefit of the insurer on them, he should be liable for the increased freight, but not if this increased freight might be avoided by a delay which would not be injurious to the goods, and they are sent forward for the benefit of the owner.[1]

on the cargo, the contract was one of indemnity and the underwriters had nothing to do with the freight. So, in Caze *v.* Baltimore Ins. Co., 7 Cranch, 358, where the vessel and cargo were condemned and the cargo abandoned and accepted by the underwriters, it was held, that they were not liable for freight. And in Col. Ins. Co. *v.* Catlett, 12 Wheat. 383, it was held, that although the underwriters on goods might, in order to obtain the goods as salvage, have to pay freight, yet they could deduct this amount from the loss, or recover it as money paid for the insured. See also, Gibson *v.* Philadelphia Ins. Co., 1 Binn. 405.

[1] We have seen in our first volume; p. 162, that if the master transships the goods at an advanced freight, the owner of the goods is liable, but the question still remains, whether, if his goods are insured, he can look to his insurer for this amount. In Mumford *v.* Commercial Ins. Co., 5 Johns. 262, goods were insured from New York to Amsterdam. The ship was captured, carried into Halifax, and there libelled, with the cargo. The ship was acquitted and the master offered to carry on the goods, but as they were detained for further proof, they could not be obtained and the ship sailed without them, a claim being first made for the full freight. The goods were subsequently restored on condition, that a proportional part of the costs of the libel, and the full freight should be paid. This was done, and the goods were subsequently brought to New York in another vessel, at an additional freight. It was held, that this was a loss consequent on the capture, and one for which the underwriters on the cargo were liable. And in Hugg *v.* Augusta Ins. & Banking Co., 7 How. 595, 609, where the question was as to the duty of the master to forward the cargo, and the effect of his not doing so upon the underwriter on freight, the court said: "The owner of the cargo is liable for any increased freight arising from the hire of another vessel." There is also a *dictum* to the same effect in Rosetto *v.* Gurney, 11 C. B. 176, 7 Eng. L. & Eq. 461, 467.

In Dodge *v.* Union Marine Ins. Co., 17 Mass. 471, a ship and cargo were insured at and from Hamburgh to one or more ports, one or more times, on the globe, and until her arrival at her port of discharge in Europe or America. On a voyage from Siam to Amsterdam the vessel put into the Isle of France in distress, discharged her cargo, and was afterwards totally lost at that place in a hurricane. There was no controversy in regard to the loss of the ship, and the only question was, whether the underwriters were liable for the hire of a Dutch ship to carry the cargo to Amsterdam, the insured being willing to credit the underwriters with the amount it would have cost to have carried the same in the original vessel, if she had not been lost. The freight for the whole voyage was $9,000, and it was proved at the trial, that half the freight was earned on the arrival of the vessel at the Isle of France, so that the freight she would have earned from thence to Amsterdam, would have been $4,500, and the Dutch ship was hired for less than this sum. It was held, for this reason, that there was no increased freight. *Wilde*, J., further said: "If, however, the Dutch ship had cost more, the underwriters would not have been liable; because the extra expense would have fallen upon the ship-owner, and not on the owner of the goods. The ship-owner was bound to provide a new ship, after the loss of the Jason; and if he had refused to

In one case, the decision of this question seems to turn upon the fact, whether the master was bound to send the goods on, after his own vessel was lost; the substituted ship, in such a case, being considered to be provided at the expense of the ship-owner.[1] But, as we have already seen, that though it is the duty of the master to forward the goods in another vessel, if possible, yet if he does so at an increased rate of freight, the owner of the goods is liable therefor,[2] and this criterion would not now, probably, be adopted.

It may be added that, in the case of a sale of cargo at an intermediate port, which might have been carried on in safety to the ship, and with every probability of its safe arrival in specie, so as to be bound for a full freight, but the sale is made because the advancing decay of the goods makes it certainly for the benefit of the shipper, the assent of the shipper and his consequent obligation to pay the freight which would have been earned by the carrying on of the goods, will be presumed. And if the goods are sold at an intermediate port, because of danger from spontaneous fermentation and combustion, he may have still a valid claim against the insurers for his partial loss, or his claim against the shippers of the goods for his freight, if the damage were not caused by a peril of the sea. Generally, the insurers are not discharged by any conduct of the master as to drying, restoring, selling, or destroying any cargo, if his conduct be required or justified, either by his bills of lading (if they contain no unusual provisions) or by his general duty as master.

do so, he could have claimed no freight for the transportation of the goods to the Isle of France. We must, therefore, consider the master as acting for the ship-owner in hiring the Dutch ship, and that the owner of the goods was bound to pay only the stipulated or customary freight from Siam to Amsterdam." In Shultz *v.* Ohio Ins. Co., 1 B. Mon. 336, goods were insured from Maysville to New Orleans, at the rate of fifty cents per hundred pounds. The vessel on the voyage was injured and part of the goods were damaged and unloaded. The sound goods were taken on by the master of the damaged boat, and the damaged goods were reshipped in another boat at an increased rate of freight. It did not appear that it was necessary to send the goods forward so soon, and the court were of the opinion, that it was done for the benefit of the owner of the cargo, in order that his goods might come to the market sooner, and was not done for the benefit of the insurer, and it was accordingly held, that he was not liable for this increased freight.

[1] See Dodge *v.* Union Marine Ins. Co., 17 Mass. 471.

[2] See ante, Vol. I. p. 163, n. 1.

When the goods are in a damaged condition at an intermediate port, it is, as we have seen, the master's duty to forward them if he can, and if the goods require drying or washing, as hides sometimes do, to enable them to be brought on, and this can be done at a reasonable expense, it would clearly seem to be the duty of the master to cause this to be done. And, if he fails in his duty in this respect, the underwriters are not liable.[1]

The insurer takes no part of the risk of the rising or falling market.[2] He pays as a partial loss, what the goods have lost from their original invoice value. If the goods are damaged and sold at their loading port for half of their invoice value, and are then bought by other parties and carried on to their port of destination where they are worth nearly their original value, the insurer is liable for the damage as it existed at the loading port.[3] And if different articles which are included in one policy are damaged, the loss on each article should be adjusted by itself.[4] So if expense is incurred on many articles for their common benefit, this expense should be charged on each separately, in proportion to its relative value. And where an insurance is made on all goods that may be carried in certain vessels within

[1] Navone *v.* Haddon, 9 C. B. 30. See also, Rosetto *v.* Gurney, 11 C. B. 176, 7 Eng. L. & Eq. 461; The Bark Gentleman, Olcott, Adm. 110. That the master may delay the voyage for this purpose a reasonable time is well settled, as we have already seen. See ante, p. 388, n. 4.

[2] Thus in Lewis *v.* Rucker, 2 Burr. 1167, 1172, Lord *Mansfield*, C. J., said: "The nature of the contract is, that the goods shall come safe to the port of delivery, or, if they do not, to indemnify the plaintiff to the amount of the prime cost, or the value in the policy. If speculative destinations of the merchant, and the success of such speculations were to be regarded, it would introduce the greatest injustice and inconvenience. The underwriter knows nothing of them."

[3] Hardy *v.* Innes, 6 J. B. Moore, 574. In this case an open policy was made on indigo and other goods, at and from Jamaica to the United Kingdom, the indigo valued at forty-four pounds per seron. A shipment of one hundred and ten serons was afterwards made. The vessel was upset by a squall at the port of loading, after the goods were on board, and the indigo was damaged thereby and subsequently sold, the loss amounting to 71*l.* per cent. The indigo was subsequently washed and repacked and sent on by the purchasers to the port of its original destination, where it brought nearly as much as undamaged indigo. The jury found for the plaintiff, and the case was sent to an arbitrator to determine the amount. He estimated it as a total loss at the port of loading with salvage, instead of as a partial loss, by computing the proportion of the loss at the port of delivery, after deducting the expense of preparing and drying the indigo for reshipment; and the court refused to set aside the award.

[4] Stevens & Benecke on Av., Phillips' Ed. 354, 355.

a specified time, in case of loss the adjustment is to be made upon the goods at risk on the particular vessel at that time.[1] If the goods have sustained loss or deterioration by leakage, or breakage, or natural decay or inherent defect, before the partial loss happens for which the insurers are liable, a proper and adequate deduction on this account should first be made from the invoice value.

In the case of what is often called a salvage loss, which occurs where a part of goods insured are sold at an intermediate port, by reason of damage to that part, from the proceeds are deducted all expenses, and then the net proceeds, if received as they usually are, by the master and transmitted to the shipper, are by him to be paid to the insurer, and allowed for to him, and the insurer pays the whole loss on that part of the goods.[2] It is in fact settled as if there were an abandonment and transfer, though none are made.

[1] Crowley *v.* Cohen, 3 B. & Ad. 478.

[2] Kettell *v.* Alliance Ins. Co., Sup. Jud. Ct., Mass., March T. 1857. In Bridge *v.* Niagara Ins. Co., 1 Hall, 423, the vessel was wrecked, and the crew escaped with some gold dust, part of which was buried, and part they took with them, intending to return and take away what was buried. Various expenses were afterward incurred for this purpose, and the court held that "All losses, charges, and expenses, necessarily, prudently, or reasonably incurred in respect to the property saved, from the time of the shipwreck to the time when the property could be directly transported to its ultimate destination, are proper charges upon the property so transported, and ought to be borne by the insurers. That the sums paid for transporting the master and crew, for their support, board, lodging, and passages, during the same period, are also proper charges upon the property, and ought to be borne by the assurers. That the master and seamen, also, after becoming disconnected from the vessel by wreck, are entitled to compensation as laborers, or salvors, for their services in transporting and saving the cargo; to be allowed according to the nature of the services. That the sums for going after the dollars buried were properly allowed and properly apportioned on the dollars, alone."

CHAPTER XIII.

OF THE ADJUSTMENT.

AN adjustment, though usual, is not always essential. Thus the insured can recover a total loss without presenting an adjustment as for a partial loss.[1] There is no particular form established by law or usage for the adjustment of a claim on insurers, but they are usually made in all the United States in a very similar way, both as to form and principle.[2] They are instruments of much importance, although sometimes very brief and simple, for the law makes them binding upon the parties.[3] There are, however, to these documents, the same exceptions as to others, and, indeed, as to all contracts. If tainted with fraud, they have no force or effect whatever against the party defrauded;[4] but the fraudulent party cannot avail himself of his wrongdoing for his own benefit. And an adjustment made upon a misrepresentation or concealment,[5] if it be of a material

[1] Fuller *v.* Kennebec Mut. Ins. Co., 31 Maine, 325.

[2] In England the custom is, on a loss taking place, for the broker to indorse on the policy: "Adjusted the loss on this policy at £—— per cent." The broker then takes the policy round to the different underwriters who sign their initials to the indorsement, and the policy is then said to be adjusted. 2 Arnould, Ins. 1201. In one case, the signature of the defendant was struck out and the adjustment written in the blank space opposite his name, and his initials affixed to it. Adams *v.* Saundars, 4 Car. & P. 25.

[3] In Hog *v.* Gouldney, Beawes, Lex Mercatoria, 310, Park, Ins. 162, decided in 1745, *Lee*, C. J., considered an adjustment signed by the underwriter as a note of hand, and that no further proof of the loss was necessary. See also, Hewit *v.* Flexney (1746), Beawes, Lex Mercatoria, 308; Adams *v.* Saundars, 4 Car. & P. 25; May *v.* Christie, Holt, N. P. 67, and cases *infra*.

[4] Thus in Haigh *v.* De la Cour, 3 Camp. 319, an adjustment made upon the production of fictitious invoices and bills of lading, was held not to be binding.

[5] Faugier *v.* Hallett, 2 Johns. Cas. 233. The property had been captured, but a large portion was saved. The assured did not mention this fact, and the adjustment

fact, is invalid. If it is made upon any material mistake of the facts, it has no force against either party;[1] and so if made upon a mistake of law.[2] But if the money is actually paid over,

was made at ninety-eight per cent. The court held that it was not binding. In Shepherd *v.* Chewter, 1 Camp. 274, at the time of the adjustment, there was a notice posted up at Lloyd's, where the parties were at the time, that the vessel had chased every thing she saw, and had been at last captured through the cowardice of the master. The underwriter said when he signed the adjustment, that it was not likely that the ship was lost by cowardice, as the master had been killed. The defendant proved that the ship had been in the constant habit of cruising, which amounted to a deviation. It was contended for the plaintiffs that the only defence which could be set up was, that some fraudulent concealment had been practised, but that notice that the vessel had chased every thing, informed him of the deviation. It was held that the adjustment was *primâ facie* conclusive, but that it did not bind the underwriter, unless a full disclosure was made, and that if the notice drew his attention merely to the way in which the vessel was captured, the adjustment did not bind him, and that as the vessel had a letter of marque, she had a right to chase every thing on the direct line of her voyage, and consequently the notice did not necessarily draw the attention of the insured to the fact that a deviation had taken place.

But if the underwriter has all the facts before him, it is no excuse that he read the papers in a cursory manner. Voller *v.* Griffiths, before Lord *Kenyon*, C. J., Selw. N. P. 985.

[1] Rogers *v.* Maylor, Park, Ins. 163; Christian *v.* Coombe, 2 Esp. 489. In De Garron *v.* Galbraith (1795), Park, Ins. 163, the plaintiff produced the adjustment and rested his case. The witness who produced it, testified that soon after the underwriters signed, doubts arose as to the honesty of the transaction, and they refused to pay. Lord *Kenyon*, C. J., held, that under these circumstances, the plaintiff must go into other evidence, and, as he was not prepared to do so, he was nonsuited. In Herbert *v.* Champion, 1 Camp. 134, the defence was that at the time the policy was made, the insured had concealed a material fact, and it was held that this would avoid the policy notwithstanding the adjustment. Lord *Ellenborough*, C. J., said: "The cases are clearly distinguishable, where upon a dispute, the money is paid, and where there is only a promise to pay. If the money has been paid, it cannot be recovered back without proof of fraud; but a promise to pay will not, in general, be binding, unless founded on a previous liability. What is an adjustment? An admission on the supposition of the truth of certain facts stated, that the insured are entitled to recover on the policy. Here it is a mere admission, and there was no consideration for the promise it is supposed to prove." In Sheriff *v.* Potts, 5 Esp. 96, the adjustment was admitted, but the defendant's counsel stated that his defence turned upon a fact admitted by the plaintiff himself in his answer in equity, namely, that there had been a deviation. This deviation being proved, the plaintiff was nonsuited. In Dow *v.* Smith, 1 Caines, 32, the court said: "It appears that, previous to the adjustment, all the facts were communicated to the underwriters. The adjustment was made by the underwriters with their eyes open. An adjustment cannot be opened, except on the ground either of fraud, or mistake from facts not known." But notwithstanding this language, it being proved that the vessel sailed with an insufficient crew, a verdict for the plaintiff was set aside and a new trial granted.

[2] This is so laid down by Lord *Kenyon*, C. J., in Rogers *v.* Maylor, Park, Ins. 163,

although the insured may recover it back if it were owing to a mistake of fact,[1] yet he cannot on the ground of a mistake of law.[2] Indeed an action may be brought upon a written adjustment, or upon the policy without specially setting up the adjustment, in which case it may be offered in proof.[3] But if the insurers refuse to pay a loss, the insured is not bound by an adjustment which he had presented, but he may present a new one, more favorable to himself, and sue upon it.[4] Our policies usually make the sum insured payable in a certain number of days after "proof and adjustment of the loss," but if the insurers refuse to pay, or dispute the claim, the effect of this clause is destroyed, and no delay will be interposed against either trial, judgment, or execution, for want of the adjustment.

If an adjustment is conditional in its terms, the party setting it up must prove the performance of the conditions.[5] And it seems that it may be shown that an adjustment which on its face is absolute, was agreed by the parties by parol to be conditional only.[6]

and is in accordance with the well-settled principle that a mistake of law may always be set up in defence of an action founded on the promise of the party. The promise being considered as given without consideration. See 1 Parsons' Contracts, 363, note *t*.

[1] Reyner *v.* Hall, 4 Taunt. 725. In Kelly *v.* Solari, 9 M. & W. 54, the insured on a life policy omitted to pay the quarterly premium, and the policy became of no effect, and the word "lapsed" was written on the policy by one of the directors. The insured died, and two of the directors who had known of the fact of the policy having lapsed together with another director, on application being made, drew a check for the amount. The mistake being discovered, the insurers brought an action to recover back the amount, on the ground that it was paid under a mistake of fact, and the two directors testified that they had entirely forgotten at the time of paying the money, that the policy had lapsed. Lord *Abinger*, C. B., expressed his opinion that if the directors had had knowledge, or the means of knowledge of the policy having lapsed, the plaintiff could not recover, and that their afterwards forgetting it, made no difference. The court granted a new trial, and it was held that "the knowledge of the facts which disentitles the party from recovering, must mean a knowledge existing in the mind at the time of payment."

[2] Bilbie *v.* Lumley, 2 East, 469.

[3] Rogers *v.* Maylor, Park, Ins. 163, per Lord *Kenyon*, C. J.

[4] American Ins. Co. *v.* Griswold, 14 Wend. 399.

[5] Gammon *v.* Beverley, 1 J. B. Moore, 563, 8 Taunt. 119.

[6] Russell *v.* Dunskey, 6 J. B. Moore, 233. It was held in this case that evidence was admissible to show that the parties had agreed by parol that if other underwriters paid a less sum than the amount stated in the adjustment, the surplus should be paid back.

Not only is an adjustment binding which is made at home between the parties, but a foreign adjustment, made by competent parties, in any foreign port at which it ought to be made, if made there in good faith, with competent skill, and according to the laws of that place, is binding upon all parties interested. This rule is founded upon usage; but there are good reasons for the usage, which we have endeavored to state elsewhere.[1] It is, indeed, obvious, that a delay of the adjustment until the arrival of the ship at her home port, might be very convenient to some of the parties, but very injurious to others; as to an owner, for instance, of cargo lost by jettison, who had a lien upon all the contributory interests and property for his indemnity, some of which might be delivered from the ship, and lost to him. And if it should be made and settled as to some of the parties abroad, it is obvious that it should be finally conclusive upon all.

If an insurance is effected for A on account of whom it may concern, and the insurers are informed of the parties who claim to have an interest in the vessel, and they agree with A to submit the claim to arbitration, the agreement containing the clause, "the interest of the party for whom insurance was effected being admitted," the insurers cannot afterwards set up the defence that the interest of one of the parties was not admitted by them nor passed upon by the arbitrators.[2] And, generally, an award of arbitrators is conclusive upon the parties.[3]

If a suit is compromised by the parties to it, this is generally conclusive, and the compromise is not subject to be opened by the discovery of further evidence on a point which constituted the chief objection to the payment of the claim in the first instance.[4]

[1] See ante, p. 431–433.

[2] Richardson *v.* Suffolk Ins. Co., 3 Met. 573.

[3] Newburyport Mar. Ins. Co. *v.* Oliver, 8 Mass. 402.

[4] Barlow *v.* Ocean Ins. Co., 4 Met. 270. In this case insurance was effected by the mortgagee of a vessel, and also by the captain who was the general owner, by separate policies on their respective interests. A loss having taken place, a suit was brought by the master on his policy, and the underwriters defended, on the ground that the master had fraudulently cast away the vessel. The plaintiff having obtained a verdict, exceptions were taken, and while the suit was pending, a compromise was effected by which the defendants agreed to pay the amount of the verdict on the captain's policy,

It has been held that if the insured settle with the underwriters for a partial loss, and give up their policy without notifying them of a claim pending in the admiralty court for salvage, if this case is decided against them, they cannot recover the additional amount from the insurers.[1] So, if payment is made on a claim for a total loss, this is equivalent to an adjustment.[2] If one of two part-owners who has authority to insure for both, effects an insurance, and on a loss taking place, receives the amount of his proportion from the underwriters, on releasing them from all further responsibility on the policy, the other part-owner has a right to elect to treat the compromise as binding, and recover his proportion from his copartner.[3]

An adjustment, and a settlement under it, will leave the insured his claim or remedy on the policy, so far as the subject-matter thereof is not included in the adjustment. Whatever, for example, an award may be, the question will always be open, how far the award is executed. And thus, if insurers being held to indemnify for certain injuries, take the vessel and repair and return her, and the insured accept her, they have still their action against the insurers, if the repairs are not what they ought to be.[4] In a case where the insured refrained from abandoning, because the underwriters promised to be answerable for the repairs, it was held, that they were only liable as for a partial loss.[5]

The insured may sometimes recover for more than a total loss; as by expenses properly incurred by the insured under

and three fourths of the amount claimed by the mortgagee. This settlement was indorsed on the policy, and a note for the amount given. The underwriters having discovered further evidence going to show that the master had bored and scuttled the vessel, refused to pay the note. No fraud on the part of the mortgagee was suggested, and it did not appear that he had any knowledge of the way in which the vessel was destroyed. Under these circumstances, the court refused to set aside the compromise. In Kelly *v.* Solari, 9 M. & W. 54, where payment was made on a lapsed policy, and a suit brought to recover it back on the ground that the directors had forgotten the fact that it had lapsed, it was held that the insurers could not recover it back, if the jury should find that the directors had determined to pay the money at all events, in order not to render the office unpopular.

[1] Batre *v.* Louisiana Ins. Co., 13 La. 577.

[2] M'Lellan *v.* Maine F. & M. Ins. Co., 12 Mass. 246.

[3] Briggs *v.* Call, 5 Met. 504.

[4] Reynolds *v.* Ocean Ins. Co., 22 Pick. 191.

[5] Webb *v.* Protection Ins. Co., 6 Ohio, 456.

some provision of the policy, or by contribution for average in some cases.[1] Beside this, however, we should say that there may be a partial loss, repaired and paid for by the insurers, and a subsequent total loss for which they would be liable, without the right of requiring that the amount first paid should be deducted from the claim against them for a total loss.[2] Nevertheless if a partial loss takes place, and then a total loss, the partial loss is merged in the total loss, so that the underwriters are liable only for the total loss, unless some expenses were previously incurred in respect to the partial loss.[3]

[1] See cases ante, p. 419, n. 1.

[2] Le Cheminant *v.* Pearson, 4 Taunt. 367.

[3] Livie *v.* Janson, 12 East, 648; Schieffelin *v.* New York Ins. Co., 9 Johns. 21. See Knight *v.* Faith, 15 Q. B. 649. In Stewart *v.* Steele, 5 Scott, N. R. 927, the vessel sailed on her voyage, came into collision, was damaged and put back. She was then recoppered, and sailed again, but was found to be in a leaky condition and again put back. To ascertain the extent of the damage, her wales were taken off and she was found to be so rotten that they were not put on again, and the vessel was sold as a wreck. It was held, that the proper measure of damages was the immediate and necessary consequences of the collision, together with such charges and expenses as might be reasonably said to be incident thereto. The jury having found a verdict for a partial loss, allowing the expense of coppering and the estimated cost of replacing the wales, the court set aside the verdict and granted a new trial, on the ground, that the cost of replacing the wales not being actually incurred, the insured was not injured by their being taken off, as the vessel was sold as a wreck.

CHAPTER XIV.

OF AGENTS.

SECTION I.

OF INSURANCE AGENCY IN GENERAL.

THE contract of insurance may, in every respect, and in all its parts, be effected by agents; whose acts bind their principals in the same way as in other business transactions.

It is more common for the insured to act by an agent, than for the insurers; and more common for insurers against fire than for marine insurers. But insurers against perils of the sea, sometimes have their agents to originate, or even to make their contracts; and very frequently act under their own contracts, in case of actual or alleged loss, by agents.

There are no principles which belong exclusively to agency in insurance matters; none, that is, which are not recognized as a part of the general law of agency. But there are some peculiarities in the application of these principles, and it is rather of these that we propose to speak in the present chapter.

Much that belongs to this topic, has indeed been already stated, by anticipation, while considering other subjects. Thus, we have already treated of the implied authority to act as agents in effecting insurance, which persons may have because of their relations to the owners of the property; for example, as ships' husbands, or as joint-owners, or as copartners.

We have also considered quite fully, the subject of ratification of an authority; either by bringing suit or otherwise. Also,

representations or concealments by agents. Also, of the agency for the insurers, cast upon the insured or his master or servants, by a loss and abandonment.

In this chapter, after a few remarks on these and similar topics, we propose to consider, in separate sections, first, the powers of agents; secondly, the duties of agents; thirdly, the rights of agents; fourthly, of voluntary agents.

We remark in general, and rather that these universal principles may be kept in mind, than because of their especial relation to insurance, that no agreement by, or act of an agent, binds his principal, unless the agent acted therein within the scope of his authority, whether that were express or implied. Next, that any lawful act purporting to be done by an agent for a principal, may be ratified by that principal, and being so ratified, has the same effect as if done by previous authority.[1] And even if the contract of insurance violate a statute, and a loss occur under it, which the insurers pay to the agent, he must pay it over to his principal, if the insurers have not notified him to hold it as theirs, in which case it does not rightly belong to his principal.[2]

The courts of England differ from those of this country, in regard to the rights of the insurers, when a contract of insurance is made by an agent. There, they seem to permit the insurers in the settlement of the loss, to set off all claims against the agent; and to consider the principal only as subrogated to the rights of the agent, without any enlargement whatever, unless there be some contrary provision in the policy.[3] Here, if the insurance is, in effect (whatever be its form), made by A for the benefit of B, the insurers can set off against B's claims, only their

[1] Thus, as we have already seen, ante, p. 33, n. 5, the owner of property may adopt an insurance effected by an agent. See also, Sidaways v. Todd, 2 Stark. 400.

[2] Tennant v. Elliott, 1 B. & P. 3; Farmer v. Russell, id. 296. In Edgar v. Fowler, 3 East, 222, the insured had not actually paid the premium on an illegal contract of insurance, over to the defendants, who were insurance brokers, but the latter had credited the insurers with the amount, and were afterwards notified not to pay it over to the underwriters. It was held, that the latter could not bring an action for money had and received, the contract being illegal and the money not having been actually paid over. See also, Booth v. Hodgson, 6 T. R. 405.

[3] See 1 Arnould, Ins. 108–142; Gibson v. Winter, 5 B. & Ad. 96; Wilkinson v. Lindo, 7 M. & W. 81.

claims against B himself.[1] The peculiar view of the English courts seems to be derived, in some degree at least, from the peculiar usages of that country in respect to insurance brokerage. There, it would appear, nearly all insurance business is managed by insurance brokers, who constitute a regular profession, and are as distinctly recognized in the law as well as in practice, as the insurers are. As each insurance company is very likely to have many contracts effected by the same broker, it seems that both usage and law permit them to regard the broker as in some degree the principal. They usually know only him, and look to him as their security; and the broker is considered as the agent of both parties.[2]

SECTION II.

OF THE POWERS OF AGENTS.

The first rule is, that a special agent cannot exceed his authority, however that be conferred.

Thus, if the act of incorporation of a company provides that the business shall be conducted in a particular manner, and that the concurrence of a certain number of officers is necessary to make an act valid, the mode prescribed must be followed.[3] And generally, if an agent has specific duties to perform, he cannot bind his principal by acts not within the scope of such duties.[4] But a general agent may bind his principal by any act

[1] See ante, p. 184, n. 4.

[2] See 1 Arnould, Ins. 108–142.

[3] See ante, p. 20, n. 1, 4; Beatty *v.* Marine Ins. Co., 2 Johns. 109.

[4] Thus, an agent of Lloyds' in a foreign port, has no power to bind the company by a certificate of the amount of damage, and such certificate is therefore not admissible in evidence. Drake *v.* Marryat, 1 B. & C. 473. And in Jellinghaus *v.* New York Ins. Co., 6 Duer, 1, it was held, that the burden was on the insured to show that the vice-president of an insurance company, had authority to bind the company by accepting goods. And the secretary of a railroad company has no authority to bind it. Williams *v.* Chester & Holyhead Railway Co., 5 Eng. L. & Eq. 497. Nor has the treasurer of a corporation any right to release a claim which belongs to the corpora-

within the scope of his authority, although he has private instructions which limit his power, if these instructions are not known to the insured.[1]

If an agent having sufficient authority for his acts, fails to report to his principals (being an insurance company), facts or information which his duty to them required of him, this does not invalidate his acts as their agent, so far as the insured are concerned.[2]

Nor has an agent of insurers, any implied authority to annul or dispense with any specific rule of the insurers, made known to the insured. Thus, if the policy requires that certain facts (as, for example, subsequent insurance), should be indorsed on the policy, an assurance by the agent of the company that his own entry of it on his own records will do as well, has been held not to bind the insurers if the entry were not actually made on the policy.[3]

The second rule may be said to be, that whenever the authority of an agent arises from a necessity, it is measured by that necessity.

As to authority derived from some other relation beside that of sole ownership, it may be said, in general, that wherever any actual interest in property, vests in any person, by contract, or by operation of law, or even officially, it carries with it the

tion. E. Carver Co. *v.* Manufacturers' Ins. Co., 6 Gray, 214; Dedham Institution for Savings *v.* Slack, 6 Cush. 408.

[1] Lightbody *v.* North American Ins. Co., 23 Wend. 18. In McEwen *v.* Montgomery County Mutual Ins. Co., 5 Hill, 101, notice of a prior insurance given to a travelling agent of the insurer, whose duty it was to solicit insurances, make surveys, and receive applications, was held to be notice to the insurer. See also, Sexton *v.* Montgomery County Mutual Ins. Co., 9 Barb. 191. And notice to an agent of an incumbrance on the property insured, is notice to the insurer. Masters *v.* Madison County Mutual Ins. Co., 11 Barb. 624. In Mellen *v.* Hamilton F. Ins. Co., 5 Duer, 101, it was held, that the knowledge of a further insurance by an insurance broker who procured the policy for the assignor of the plaintiff, from the defendants, could not be considered as knowledge to them, there being no proof of his being such a general agent as would make them liable for his acts of knowledge. And in Vose *v.* Eagle Life & Health Ins. Co., 6 Cush. 42, 49, it was held, that the knowledge of an insurance agent, whose duty it was merely to receive the application and forward it to the company, of the condition of the health of the assured in a life policy, was not sufficient to avoid the effect of a misrepresentation by the assured on the subject of his health.

[2] Gloucester Manuf. Co. *v.* Howard F. Ins. Co., 5 Gray, 497. See also, Wing *v.* Harvey, 5 De G. M. & G. 265, 27 Eng. L. & Eq. 140.

[3] Worcester Bank *v.* Hartford F. Ins. Co., 11 Cush. 265.

power of causing the property to be insured, either as agent or as principal, as the case may be.[1]

An agent is not only limited by the terms of his authority, or by the necessity from which it springs, but also by the general principles of trust. Thus, an agent, who has any charge of, or in respect to insured property, if he be an agent to sell, cannot buy; and if he be an agent to buy, he cannot be interested in the sale.[2]

An authority carries with it, in general, power to do all lawful acts necessary to the execution of the authority. Thus, an agent of an insurance company who is intrusted with printed forms of policies, which are signed by the officers of the company, and are to be filled out, countersigned, and issued by him, has authority to add to the policy before it is delivered a memorandum that the property insured is in course of construction.[3] And in one case, in the absence of any proof of any limitation of the power of the agent, it was held after an open policy of insurance declared to be "on property on board vessel or vessels, as per indorsement to be made thereon," had been signed, that the agent might agree that the policy should cover a number of bales of cotton on shore at New Orleans from date of storage until shipped.[4] The power to effect insurance for a principal, carries with it the power to sign a premium note for the principal; and generally, the principal may be held liable for such a premium. But he cannot be sued on the note itself, if that be signed by the agent in his own name only, and without words indicating that he signs as agent.[5]

So, it is held, that the authority to effect insurance for the insurers, carries with it the authority to adjust, or agree to an adjustment of, a loss.[6] And that the authority to make a con-

[1] See ante, ch. 2, § 3, p. 74.

[2] See ante, p. 414, n. 4.

[3] Gloucester Manuf. Co. *v.* Howard F. Ins. Co., 5 Gray, 497.

[4] Kennebec Co. *v.* Augusta Ins. & Banking Co., 6 Gray, 204.

[5] See ante, ch. 5, § 1, p. 182–184.

[6] Richardson *v.* Anderson, 1 Camp. 43, n. In Goodson *v.* Brooke, 4 Camp. 163, the agent who subscribed the policy on the happening of a loss, agreed to refer the matter to arbitrators. There was no direct proof of his authority to agree to the reference; but it appeared that he was in the habit of settling losses for the defendant, which the latter afterwards paid. It was held that this was sufficient evidence of agency to render the award binding on the insurer. But an insurance broker has no

tract of insurance in behalf of the insured, gives the agent power to make an abandonment.[1]

It has been held that if an agent is authorized to make a contract of insurance, to take effect from the time when the premium shall be paid and shall be received at the office of the insurance company, provided the office shall recognize the rate of premium, and be otherwise satisfied with the risk, then if the usual premium is paid to the agent, and he takes the risk, that the company are liable, although the premium is not received by them before the loss; and that they cannot arbitrarily be dissatisfied with the risk or with the premium.[2] But generally the authority of an agent does not empower him to issue a policy when the property has been destroyed while the application for the insurance was on its way to the agent from the owner of the property.[3] The authority of an agent to issue a policy is to be determined by the rules of agency applicable to all other contracts. As a general rule, the instrument under which the agent acts, need not be produced, and his agency may be inferred from the fact that the underwriter has paid losses without objection on other policies issued by him.[4]

If the insured delivers up the policy to an insurance broker

implied authority to pay a loss due from the underwriter who employs him, to the assured. Bell *v.* Auldjo, 4 Doug. 48.

[1] Cassedy *v.* Louisiana State Ins. Co., 18 Mart. La. 421; Parker *v.* Towers, 2 Browne, App. 80. This point was also expressly decided in Chesapeake Ins. Co. *v.* Stark, 6 Cranch, 268, where the jury found a special verdict that the insurance was effected by the agent of the insured, and that the same agent abandoned "for the plaintiff." *Marshall*, C. J., said: "The agent who made the insurance might certainly be credited, and in transactions of this kind, always is credited, when he declares that, by order of his principal, he abandons to the underwriters. In this case, the jury find that the abandonment was made for the plaintiff; and this finding establishes that fact." In a case where a part-owner, insured in his own name for the benefit of whom it concerned, on a loss having taken place, abandoned the property by a letter signed with his own name only, and not stating what interest was abandoned, it was held that he was duly authorized, *primâ facie* to make the abandonment for himself and those for whom the insurance was made in his name, and that as there was no evidence of dissent on their part, the abandonment was sufficient. Reynolds *v.* Ocean Ins. Co., 22 Pick. 191. See also, Hunt *v.* Royal Exch. Ass. Co., 5 M. & S. 47.

[2] Perkins *v.* Washington Ins. Co., 4 Cow. 645.

[3] Bentley *v.* Columbia Ins. Co., 17 N. Y. 421.

[4] Haughton *v.* Ewbank, 4 Camp. 88.

for the purpose of obtaining the amount due on it from the underwriter, and the latter pays the sum over to the broker, the broker thereupon becomes the debtor of the insured, and the underwriter is discharged.[1] But the question has arisen, whether the fact of the account being settled between the broker and the underwriter by the broker debiting the underwriter with the amount of the loss, and crediting the insured with the same, and the underwriter crediting the broker with the amount, is a sufficient payment to the broker. It has been held that if the underwriter's name is not struck off the policy, he is still liable, notwithstanding this transfer on the books of the parties.[2] And it makes no difference if the name is struck off, if this is done without the assent of the insured.[3] These cases proceeded principally upon the ground that the authority to the agent to receive the amount of the loss, gave him only a power to receive it in cash, and that the underwriter was not discharged by merely crediting the broker with the amount; and that no knowledge of any usage to the contrary was brought home to the insured. But there seems to be no good reason why the payment should be required to be made in cash;[4] and in a case where the party was proved to have known the usage, it was held that he was bound by it.[5]

[1] Scott *v.* Irving, 1 B. & Ad. 605. See also, Erick *v.* Johnson, 6 Mass. 193.

[2] Russell *v.* Bangley, 4 B. & Ald. 395; Todd *v.* Reid, 4 B. & Ald. 210; Jell *v.* Pratt, 2 Stark. 67. In Stewart *v.* Aberdein, 4 M. & W. 211, 224, the case of Todd *v.* Reid being cited, *Parke*, B., said: "With regard to that case, it certainly is incorrectly reported. I was counsel in the cause, and there was no proof at all of any settlement in account between the broker and the underwriter."

[3] Bartlett *v.* Pentland, 10 B. & C. 760. See also, Scott *v.* Irving, 1 B. & Ad. 605.

[4] In Stewart *v.* Aberdein, 4 M. & W. 211, 218, at the trial at *nisi prius*, Lord *Abinger*, C. B., expressed his opinion "that if one man has to pay another money on account of his principal, and there is money due to him from such other person, it makes no difference to the principal whether there is an interchange of bank-notes, or a mere transfer of accounts from one side to the other, and that it is equally a payment, if it is done without fraud."

[5] Stewart *v.* Aberdein, 4 M. & W. 211. Lord *Abinger*, C. B., in this case, said: "It must not be considered, that by this decision the court means to overrule any case deciding that wherever a principal employs an agent to receive money, and pay it over to him, the agent does not thereby acquire any authority to pay a demand of his own upon the debtor, by a set-off in account with him. But the court is of opinion, that where an insurance broker, or other mercantile agent has been employed to receive money for another, in the general course of his business, and where the known general

As soon as the insurance broker has received credit in account with the underwriter, for the amount of the loss, it has been held that he is liable to the assured in an action for money had and received.[1] And he certainly is liable if he receives the acceptance of the underwriter payable at a date later than that at which the loss would be payable.[2] When a loss is payable at a certain time after the preliminary proofs are presented, it would seem that the underwriter may pay the same to the agent of the assured who is authorized to receive the amount, within the time, and that a revocation of the authority of the agent, subsequent to payment, but before the expiration of the time designated in the policy for the payment, would not render the underwriters liable.[3]

The same person may be the agent of both parties; or, being the general agent of one, he may be made the special agent of the other; and this special agency may be inferred from circumstances. And if a party who desires to be insured, employs a person who is agent of the insurers, and so employs him as to make him his agent, he is as responsible for the acts or omissions of such agent in his behalf, as he would have been if that person had not been the agent of the other party.[4] But generally

course of business is for the agent to keep a running account with the principal, and to credit him with sums which he may have received by credits in account with the debtors, with whom he also keeps running accounts, and not merely with moneys actually received, the rule laid down in those cases cannot properly be applied, but it must be understood, that where an account is *bonâ fide* settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention, and with the authority of the principal." See also, Erick *v.* Johnson, 6 Mass. 193.

[1] Andrew *v.* Robinson, 3 Camp. 199. See also, Ovington *v.* Bell, 3 Camp. 237.

[2] Wilkinson *v.* Clay, 6 Taunt. 110, 4 Camp. 171. The broker in this case debited the underwriter with the amount of the loss, and took his acceptance for the balance of the account between them payable at a time subsequent to that when the loss would be payable. It was held that he was liable for money had and received.

[3] It was so decided in Scott *v.* Irving, 1 B. & Ad. 605, but the court were of a different opinion in Bethune *v.* Neilson, 2 Caines, 139, where it was held that an agent, although in possession of the policy, had no right to receive payment till the time mentioned in the policy had expired.

[4] Smith *v.* Empire Ins. Co., 25 Barb. 497. The parties desiring insurance in this case, handed an application to a person who was the agent of the defendants, for the purpose of receiving and forwarding applications, with the request that he would fill

in any contract requiring the exercise of judgment and discretion, a person cannot act as the agent of the two parties in interest. Thus, if a person is a director of one company and the agent of another, he cannot as such agent insure with the second, any interest belonging to the first company.[1] A single partner has all the powers which his firm, who are agents of an insurance company, have to make a contract of insurance.[2]

SECTION III.

OF THE DUTIES OF AGENTS.

Any person undertaking any work for compensation, impliedly warrants that he has sufficient knowledge, and will take sufficient care, to do it as it should be done. But this obligation on the part of the agent is affected by circumstances, because it must always be qualified by the rule, that the party employing him cannot demand of him more skill or more care than he had a right to expect. If therefore one desiring insurance goes to a professed insurance broker, he has a right to insist upon proper professional skill and reasonable care.[3] But if he chooses to em-

it out subsequently, there being no conveniences for writing there, and forward it. Nothing was said about incumbrances in the application, or by the parties, but the agent made a statement in the application that there was no incumbrance except one mentioned. It was held that the agent acted as the agent of the insured in filling out the application, and that they were liable for the consequences of his act.

[1] New York Central Ins. Co. *v.* National Protection Ins. Co., 14 N. Y. 85; Utica Ins. Co. *v.* Toledo Ins. Co., 17 Barb. 132.

[2] Kennebec Co. *v.* Augusta Ins. & Banking Co., 6 Gray, 204.

[3] Thus in Chapman *v.* Walton, 10 Bing. 57, where it was contended that the defendant had not correctly obeyed the orders of the plaintiff, *Tindal*, C. J., said: "The point therefore to be determined is not whether the defendant arrived at a correct conclusion upon reading the letter, but whether upon the occasion in question, he did or did not exercise a reasonable and proper care, skill, and judgment. This is a question of fact, the decision of which appears to us to rest upon this further inquiry, namely, whether other persons exercising the same profession or calling, and being men of experience and skill therein, would or would not have come to the same conclusion as the defendant. For the defendant did not contract that he would bring to the performance of his duty on this occasion, an extraordinary degree of skill, but only a

ploy any friend who has only a general mercantile knowledge or even less, he has a right to make such a man his agent, but not a right to demand from him the same skill or the same care that he could expect from one practised in this business and professing to make it his own.

If a person promises for a valuable consideration, to effect insurance for another, he is of course liable if he neglects to do so.[1] And the right to require that a party should effect insurance for another, and to hold him liable for not doing it, seems to rest on the same principle, namely, that the owner has, in reason and good faith, a right to consider himself insured. Thus, it is said, that this right exists, if the owner, when he sends orders to his agent, has effects in that agent's hands, or if he sends or consigns effects, with his orders, or if he has been accustomed to send such orders and find them complied with, and nothing of word or fact has occurred to indicate that this custom will be broken.[2]

If goods are sold on an order and sent to the vendee, it appears to be the custom in some parts of the country for the vendor to insure them, and in case of his neglect to do so, it seems that he would be liable to the consignee.[3]

reasonable and ordinary proportion of it." Reasonable skill and ordinary diligence are defined in Mechanics Bank *v.* Merchants Bank, 6 Met. 13, 26, as follows: "By reasonable skill is understood such as is ordinarily possessed and exercised by persons of common capacity, engaged in the same business or employment; and by ordinary diligence is to be understood that degree of diligence which persons of common prudence are accustomed to use about their own affairs." Thus, if a custom prevailed to transact business in a particular way, an agent would not be liable if he conformed to that custom, although the custom should be afterwards decided to be contrary to law, there being no obligation on the part of the agent to correctly decide dubious points of law. Pitt *v.* Yalden, 4 Burr. 2060; Baikie *v.* Chandless, 3 Camp. 17; Mechanics Bank *v.* Merchants Bank, 6 Met. 13.

[1] Ela *v.* French, 11 N. H. 357.

[2] Per *Buller*, J., in Smith *v.* Lascelles, 2 T. R. 187. See also, Wallace *v.* Tellfair, cited 2 T. R. 188. In De Tastett *v.* Crousillat, 2 Wash. C. C. 132, and in Morris *v.* Summerl, id. 203, it was held, that a foreign merchant who was in the habit of insuring for his correspondent, was liable, if on receiving an order to insure, he neglected to do so, or did it in a manner different from his orders.

[3] Walsh *v.* Frank, 19 Ark. 270. The action in this case was for goods sold and delivered. The defence was that they never reached the defendant, the consignee, and that the consignor ought to have insured them. It was held, that whether it was the duty of the shipper to insure the goods without an order to do so, depended upon the general

In any of these cases, or in any case to which a similar principle applies, if the agent fails to make insurance, and the principal suffers loss thereby, he may hold the agent liable therefor.[1] And it has been held in England, that a broker who represented that he had caused a policy to be made for a party, might be sued by him in trover, for that policy, although none were made.[2]

If the orders to insure are absolute, the insurance must be effected at any rate; but it seems, in this country, that the agent need not go out of his vicinity, and if he cannot effect insurance there, he is not bound to do so at all.[3] The agent is also bound to effect the insurance within a reasonable time.[4]

custom of merchants, unless there was a special custom at the place of shipment, known to the purchaser, which was different from the general one. And it was held, that knowledge of such general custom might be shown by the previous course of business between the same parties. See also, Shirtliff *v.* Whitfield, 2 Brev. 71.

[1] In Seller *v.* Work, 1 Marsh. Ins. 299, where an insurance broker employed another broker at the request of the plaintiff, to obtain a policy of insurance, but omitted through inadvertence to deliver to the second broker a letter containing material information, in consequence of which the underwriters were discharged, it was held, that the first broker was liable. So a merchant, who, having accepted an order for insurance, limited the broker to too small a premium, in consequence of which no insurance could be effected, was held liable. Wallace *v.* Tellfair, cited 2 T. R. 188. In Strong *v.* High, 2 Rob. La. 103, an agent who had the general charge of a vessel and had insured her, was held liable for neglecting to renew the policy when it expired.

[2] Harding *v.* Carter, 1 Marsh. Ins. 303.

[3] Sanches *v.* Davenport, 6 Mass. 258. The defendants in this case being merchants in Boston, were requested by the plaintiffs in Surinam, in case the vessel should not arrive before a certain day, to procure insurance on the cargo to the amount of 56,600 guilders. The defendants endeavored to procure insurance in Boston, Salem, Newburyport, Portsmouth, and Providence, but without success, the vessel being out of time. They then wrote to their agents in New York, requesting them to procure insurance on a certain amount, less than the whole, and limiting the premium. The agents in New York could not obtain insurance on these terms, but it was finally effected at a higher rate, though not on the whole amount which the plaintiffs requested. It was contended, that although the defendants might not have been under any obligations to extend their endeavors to New York; yet, as they had in fact done so, they were liable for any negligence, or want of sufficient caution in obtaining insurance there. But the court held, that the defendants were not liable, and *Sedgwick*, J., said: "It is believed to be impossible to find an instance, where a man in a voluntary effort (not required by any principle of law), to render a benefit to another, has been holden to make good any loss, which may have happened merely because his

[4] Turpin *v.* Bilton, 5 Man. & G. 455.

If the agent has no particular directions as to the risks to be insured against, or otherwise as to the terms of the contract, it is his duty, and all his duty, to cause it to be made in the way which is customary, as to such property on such a voyage, at the place where he is to make it.[1]

It has been held in England, that if an agent is ordered to effect insurance generally, it is sufficient if he does so with an incorporated company, and he is not liable for not effecting insurance with a private underwriter, although he would have obtained, at the same rate of interest, a policy more favorable to his principal.[2]

Neither a special nor even a general agent has any authority to effect insurance merely as such an agent. But in a particular case, special circumstances may confer this authority upon him,

generous efforts did not succeed. The utmost for which he can be responsible, is a positive loss which his efforts may have occasioned; and as there is none such in this case, we are all of the opinion," that the defendants are not liable. See also, Smith *v.* Cologan, 2 T. R. 188, n.

[1] Thus, where a vessel had been insured, and a letter mentioning a change of voyage was put into the hands of an insurance broker, and he was told to do "the needful," it was held, that to determine whether he had done his duty, the papers might, at the trial, be placed in the hands of insurance brokers as experts, and they might be asked what alterations in the policy, in their judgment, a skilful broker ought to have made. Chapman *v.* Walton, 10 Bing. 57. If any usage exists they are bound to conform strictly to it. In Mallough *v.* Barber, 4 Camp. 150, where insurance brokers were ordered to procure a policy "at and from Teneriffe," it was held, that they were liable for not causing a clause, giving liberty to touch at all or any of the Canary islands, to be inserted; it being shown that a usage existed to cause such a clause to be inserted in the policy without any particular instructions to that effect. And if the agent inserts a clause in the policy which is unusual, and the underwriters are in consequence exempt from responsibility, the agent is liable. Thompson *v.* Read, 12 S. & R. 440, App.

[2] Comber *v.* Anderson, 1 Camp. 523. The insurance in this case was effected with a chartered company, by whose policy the cargo was warranted against partial loss, although the ship should be stranded. It was held, that no action lay against the broker for not effecting insurance with a private underwriter, who would have been liable for a partial loss by stranding. In Moore *v.* Mourgue, 2 Cowp. 479, general orders were given to an agent to effect insurance on a cargo of fruit. He accordingly did so with the London Insurance office, whose policies on fruit contained the clause, free from particular average. It was shown that the policies of the Exchange Assurance Company did not contain this clause. In an action against the agent for not effecting the insurance with the latter company, the jury having found a verdict for the defendant, on the ground that he had acted "*bonâ fide*, to the best of his judgment," the court refused to set it aside.

and make it his duty to insure; but his duties in this respect, must depend very much upon usage.[1]

No agent has, by the mere fact of his agency, full power of substitution,[2] unless there is a usage to this effect. But if his acts are adopted by his principal, he is not liable for a loss caused by the knavery of the sub-agent.[3] He may employ a sub-agent to make inquiries, and do many things for him; all which perhaps, do not bind the principal; but possibly, the act of the sub-agent would bind the principal, when the thing done is merely ministerial and implies no discretion or personal judgment.[4]

If it is his duty to effect insurance, and he does this, and the insurers become notoriously insolvent, it would seem, both in reason and on authority, that it is his duty to effect another insurance.[5]

[1] Shirtliff *v.* Whitfield, 2 Brev. 71.

[2] Corlett *v.* Gordon, 3 Camp. 472. The plaintiff in this case, sent a bill of lading of some cotton to the defendants, requesting them to effect insurance to the whole amount. The defendants had not done business for the plaintiffs before, and they refused to accept the consignment, but indorsed the bill of lading over to a friend and creditor of the plaintiff. He effected the insurance and received the goods and afterwards became insolvent while in possession of the proceeds. The court held, that if the defendants refused the authority sought to be conferred upon them, they could not turn it over to another, and they were accordingly held liable.

[3] Smith *v.* Cologan, cited 2 T. R. 188.

[4] Mason *v.* Joseph, 1 J. P. Smith, 406. The underwriter in this case, had given an insurance broker a power of attorney, authorizing him to underwrite any policy of insurance not exceeding £100, and to subscribe the same in his (the underwriter's) name, and to settle and adjust losses. The broker signed a slip for the policy, and the policy was afterwards signed by the broker's clerk. The court expressed a very strong opinion, that the act of signing the policy, being but a ministerial act, and not one requiring any exercise of judgment or discretion, might be performed by the clerk. But the point was not decided, as the court were of the opinion that the subsequent act of the defendant showed that he had ratified the signing by the clerk. This was, that on an adjustment of the loss signed by the broker, being presented, together with the policy, to the underwriter, he offered terms of settlement.

[5] This question is considered at length by Mr. Duer, in his valuable work on Insurance, Vol. I. p. 188–198. The foreign authorities are shown to be in conflict, and it is said, "that in the United States the mere insolvency of the insurers, can never give a right to the agent to effect a second policy, since by virtue of the clause in American policies relative to prior insurances, the second policy would be wholly void, if effected while the first is still in force." It is also said, and this we have seen to be true, that the insolvency of the insurers does not dissolve the contract. The question is also considered, whether, in case the policy is dissolved by consent, on the insurers becoming

He is, of course, bound to follow his instructions; and the more minute and detailed and the more peremptory they are, the less is his discretion.[1] It is certain, however, from the nature of the case, that he must possess a reasonable discretion (which can hardly be defined in words), both as to the construction and application of his instructions, and as to the expediency of exact compliance under special circumstances; especially, if these were unknown to his principal.

If the written instructions are followed, the broker is not liable for omitting to insert a clause respecting a subject about which there had been some prior verbal communications between the parties.[2] But it is no excuse for a neglect to effect

insolvent, it is the duty of the agent to procure another insurance. The case of Petrie *v.* Aitchison, 3 Sess. Cas. 501, before the Court of Session in Scotland, is cited to the point, that where a policy becomes inoperative after the risks have commenced, from a deviation or breach of a warranty, it is the duty of the agent to procure another policy applicable to the risks as altered. But in this case, a special order was given to this effect. See the next note.

[1] Leverick *v.* Meigs, 1 Cow. 645, 662; Glaser *v.* Cowie, 1 M. & S. 52; Rundle *v.* Moore, 3 Johns. Cas. 36. In Miner *v.* Tagert, 3 Binn. 204, the liability of the defendants as agents, for neglecting to insure was admitted, and it was also agreed that they were to be considered liable, as if they had insured the vessel themselves. They defended on the ground, that the vessel was not sea-worthy, and that they were not obliged to give a valued policy. The order for insurance was by the correspondent of the plaintiff, and was as follows: "Charge the premium to my account and advise me thereof. The brig he (Miner) values at $4,000, but wishes to have $3,000, say three fourths insured." It was held that, although this did not order a valued policy, *eo nomine*, yet that it was a fair inference from the words used. In Petrie *v.* Aitchison, 3 Sess. Cas. 501, the master was the joint owner of the vessel and the cargo, together with the defendants who acted as agents. They had procured insurance on the vessel, cargo, and master's effects. The vessel deviated, and the master wrote home informing them of the fact, and requested them to make the necessary insurance, in consequence of the alteration of the voyage. It was held, that they were bound to make insurance on the master's effects, as well as on the vessel and cargo.

We have seen, ante, p. 317, n. 2, that if goods are insured at and from a certain place, beginning the adventure from the loading of the goods on board the said ship, the goods are not covered, unless they are loaded at the place specified. It was accordingly held, where the following letter was written from Malaga to the insurance broker, "I request you will insure £1,000 on goods shipped on board The Pearl from Gibraltar Bay, ... where I shall send a letter on shore," and the agent effected an insurance on goods by The Pearl, "at and from Gibraltar to Dublin, beginning the adventure upon the said goods from the loading thereof on board the said ship," that the goods loaded at Malaga were not covered, and that the agent was therefore liable. Park *v.* Hamond, 4 Camp. 344, Holt, N. P. 80, 6 Taunt. 495, 2 Marsh. 189.

[2] Fomin *v.* Oswell, 3 Camp. 357.

insurance on one subject, that the broker was also instructed to insure another subject against an illegal risk, if the illegality would only have avoided the policy *pro tanto*.[1]

The discretion of the agent has been especially considered as to abandonment. This is often a very important step. But if it be left entirely to his discretion, all that he is answerable for, is the honesty and care with which he exercises this discretion.[2] By this abandonment, the agent of an insured, who makes the abandonment, may become thereby the agent of the insurers. As, for example, if a master of a ship wrecked near the insurers and far from the insured, has been appointed an agent by the insured, with sufficient power to make an abandonment, an abandonment properly made by him, would transfer the property to the insurers; and he would become, of necessity, the agent of the insurers. Of course, however, such an agent of the insured can have no power to make the abandonment effectual by acceptance as agent of the insurers.

An insurance agent, like every other agent, is bound to keep his principal informed, with all due promptitude, fulness, and accuracy, of whatever matter relating to the matters intrusted to him, it is important to the principal that he should know.[3] And if a broker who obtains the insurance, keeps possession of the policy after a loss has taken place, it seems, that he is bound to demand payment of the underwriters, and if he neglects to do so, he is liable for any loss that may accrue in consequence thereof.[4]

We may close this section upon the duties of agents in insurance transactions, with the general remark, that whenever it is their duty to do any particular thing, they are liable to the principal for any injury he may sustain by their omission to do that thing; and the extent of the injury is the measure of their lia-

[1] Glaser *v.* Cowie, 1 M. & S. 52.

[2] Comber *v.* Anderson, 1 Camp. 523, 525.

[3] Devall *v.* Burbridge, 4 Watts & S. 305. And if a person, although not a regular insurance broker, undertakes to procure insurance and is not successful, there is an implied obligation resting upon him to give notice to his employer of the fact. Callander *v.* Oelrichs, 5 Bing. N. C. 58.

[4] Bousfield *v.* Creswell, 2 Camp. 545.

bility.[1] And where an agent who had been ordered to procure insurance to a certain amount, did so, and afterwards, without authority cancelled the policy and obtained another for a smaller amount, he was held liable for the original amount, deducting the premium.[2]

If a broker effects insurance for a part-owner and receives from the underwriters on a loss taking place, the whole value of the property insured, he cannot as agent, dispute the claim of his principal to the whole amount.[3]

The authority of the agent to effect insurance, may be revoked at any time before he has entered into a binding contract with the underwriters. And if he does any acts after this, he does them in his own wrong.[4] Bankruptcy also, of the principal,

[1] Thus, insurance agents who neglect to obtain insurance are generally considered as liable for the amount which their principal would have obtained from the insurers, had they obeyed their instructions. They are, therefore, entitled to deduct the amount of the premium. Petrie *v.* Aitchison, 3 Sess. Cas., Scotland, 501; De Tastett *v.* Crousillat, 2 Wash. C. C. 132; Morris *v.* Summerl, id. 203. And if the policy would have been void had the agents obeyed their instructions, they are not liable for not effecting the insurance. Alsop *v.* Coit, 12 Mass. 40; Webster *v.* De Tastet, 7 T. R. 157. See also, Delany *v.* Stoddart, 1 T. R. 22. So, if the non-insertion of a particular clause, contrary to orders, in no respect injured the insured. Fomin *v.* Oswell, 3 Camp. 357. In one case, where a suit was brought on the policy, which was not successful, on account of a concealment of a material fact by the broker, and then an action was brought against the broker, it was held, that the broker was liable, but not for the expenses of the suit on the policy, it not appearing that the suit was brought by the desire or with the concurrence of the broker. Seller *v.* Work, 1 Marsh. Ins. 299.

In Maydew *v.* Forrester, 5 Taunt. 615, the assured, who had sustained losses to the amount of £18,000, failed in two suits in consequence of the neglect on the part of the defendants, who were brokers, to communicate certain material letters to the underwriters, and incurred costs to the amount of £2,400. They then gave the defendants permission to try as many more causes as they saw fit, which they declined. The plaintiffs afterwards refunded to certain underwriters, who had paid the losses without being sued, the sums so paid, without offering the defendants the option of insisting on the plaintiffs' right to retain the money so paid. The judge before whom the case was tried, left it to the jury to say "whether the plaintiffs were bound so to mix themselves with the brokers, that they were precluded from paying back those sums to the underwriters without resisting an action for them." The jury having found for the plaintiffs on the ground, that they had pursued a reasonable course, the court refused to set aside the verdict.

[2] Gray *v.* Murray, 3 Johns. Ch. 167.

[3] Roberts *v.* Ogilby, 9 Price, 269.

[4] Warwick *v.* Slade, 3 Camp. 127.

acts as a revocation of the authority of the agent.[1] And if the broker pays over the premium to the insurers after he is informed by his principal that the risk has not been run, he cannot recover it from his principal.[2] In one case, the broker engaged to effect insurance with such "names" as should be to the satisfaction of the insured. The voyage was performed and the insured did not ask to see the names on the policy, and it was held in a suit by the broker for the premium, that it was not intended that the names of the underwriters should be submitted to the assured for previous approbation, but merely that they should be unexceptionable names, and it was held, that the broker was entitled to recover.[3]

SECTION IV.

ON THE RIGHTS OF INSURANCE AGENTS.

The first and most important right of an agent (which grows out of the general principles of mercantile agency) is, his lien on the policy, and thereby a claim on the insurers for a loss under the policy, for his indemnity for all his charges, expenses, and liabilities in, about, and on account of the same policy. But his lien is confined to these,[4] unless there be an agreement

[1] Parker *v.* Smith, 16 East, 382; Minnett *v.* Forrester, 4 Taunt. 541.

[2] Shoemaker *v.* Smith, 2 Binn. 239.

[3] Dixon *v.* Hovill, 4 Bing. 665.

[4] See Man *v.* Shiffner, 2 East, 523; Green *v.* Farmer, 4 Burr. 2214. This question was much discussed in Dixon *v.* Stansfeld, 10 C. B. 398, 11 Eng. L. & Eq. 528. In this case there had been extensive dealings between the parties, the defendants acting as factors for the plaintiffs. While this state of things continued, the defendants received orders to effect insurance on a vessel, which they did, and claimed to hold the policy as security for the balance of their general account as factors. The evidence in the case was somewhat voluminous, and the court held on the whole that the transaction in question was not made by them as factors, and it was accordingly held that the lien claimed did not exist. *Maule*, J., said: "I find nothing in the case to show that this policy was effected by (the defendants) in the course of their business as factors. A factor is a person who is employed to sell goods on commission. There was no employment to sell at all connected with the employment under which this policy was effected."

of the parties extending it; or a usage of the place where both parties reside; or a custom between the parties themselves, sufficient to have this effect.[1] Whether he may retain, as his indemnity for future or immature liabilities for his principal, sums paid on the policy, must depend upon whether he has such lien on the policy, or upon his having incurred these liabilities rightfully on the credit of the policy.[2]

As a lien is, at common law, only a right of retaining and continuing possession, it is lost by a voluntary giving up of the possession.[3] But that means a giving of it up to the principal, or for his benefit; for if the agent hands the policy to another person to hold for the benefit of the agent, this is still, by construction, his possession.[4] It is held, however, that he may keep only, and not use; and therefore if he pledge it as his own, and for his own use, he loses his lien.[5]

But he may assign his balance or his demand against his principal to a third person, and if he holds the policy as his security therefor, he may transfer this security also, by placing the policy in the hands of the assignee, to be thus held for the benefit of the agent.[6] An agent may have possession of the policy for a special purpose only, as for custody, and in such a case, although he makes advances to the insured, he has no lien therefor on the policy.[7] But even if a broker has a lien on the policy for premiums which he has paid, he cannot refuse to produce it in a suit against the underwriter, and he is a good witness to prove all matters connected with the policy.[8]

So, it is said, he loses his lien, by taking a promissory note or a bill of exchange, *payable in the future*, for his claim on his princi-

[1] See Castling *v.* Aubert, 2 East, 325. By the usage of trade a factor has a lien for the balance of his general account. Godin *v.* London Ass. Co., 1 Burr. 489, 494; Hammonds *v.* Barclay, 2 East, 227; Man *v.* Shiffner, 2 East, 523. But only for his services as factor. Dixon *v.* Stansfeld, note *supra*.

[2] See Olive *v.* Smith, 5 Taunt. 56.

[3] Cranston *v.* Philadelphia Ins. Co., 5 Binn. 538. See also, Sweet *v.* Pym, 1 East, 4.

[4] Urquhart *v.* M'Iver, 4 Johns. 103.

[5] M'Combie *v.* Davies, 7 East, 5.

[6] See Urquhart *v.* M'Iver, 4 Johns. 103.

[7] Muir *v.* Fleming, Dowl. & R., N. P. 29.

[8] Hunter *v.* Leathley, 10 B. & C. 858.

pal.[1] The reason is, that this is now an agreement for a credit; and therefore, by implication, waives the lien on the policy. But this must depend upon the question of intention, whether the terms of the credit were inconsistent with the existence of the lien; and this must depend upon principles which we have before considered.[2]

If he loses his lien by restoring the policy to his principal, and while his claims are unpaid and unsecured, the policy returns into his hands from his principal, in general his lien revives, unless something said or done indicates that this is not the purpose of the parties.[3] And this has been held where the agent recovered possession of the policy, for this purpose in fact, but on a different pretence.[4]

If the insurance is effected under a special order, the terms of which are inconsistent with the existence of a lien, it is held that none exists, as where an agent who is ordered to effect insurance and forward the policy, does the former but retains the policy, it is held that he has no lien.[5]

A sub-agent has no lien on the policy as against the agent who is his principal, for the general balance of accounts.[6] Nor has he a general lien against the first principal, if he knew or had cause to know that the person who employed him was only an agent.[7] But if he did not know that he was a sub-agent, and supposed that he was effecting insurance for his employer who was the actual insured, it might be otherwise;[8] but this exception does not appear to us to be unquestionable.

Even if the agent have no lien on the policy itself, it is possi-

[1] Hewinson *v.* Guthrie, 2 Bing. N. C. 755.

[2] See Vol. I., p. 502, n. 3.

[3] Levy *v.* Barnard, 2 J. B. Moore, 34, 8 Taunt. 149; Spring *v.* South Carolina Ins. Co., 8 Wheat. 268. It was held in this latter case that the lien revived for specific, but not for general advances. But in Whitehead *v.* Vaughan, Cooke's Bankruptcy Laws, 8th Ed. 576, it was held that the lien for premiums other than that due on the policy in question, revived on the broker's obtaining possession again of the policy.

[4] Whitehead *v.* Vaughan, Cooke's Bankruptcy Laws, 8th Ed. 576.

[5] Reed *v.* Pacific Ins. Co., 1 Met. 166. See also, Walker *v.* Birch, 6 T. R. 258.

[6] Man *v.* Shiffner, 2 East, 523.

[7] Maanss *v.* Henderson, 1 East, 335. See also, Snook *v.* Davidson, 2 Camp. 218; Foster *v.* Hoyt, 2 Johns. Cas. 327.

[8] Mann *v.* Forrester, 4 Camp. 60; Westwood *v.* Bell, id. 349. But see Lanyon *v.* Blanchard, 2 id. 597.

ble that he may have, by the local law of set-off, or by agreement with his principal, or a practice and usage which affect both parties, a right to demand and receive and receipt for sums payable from the insurers, and to set these off against his demands upon the insured. The questions, however, which have arisen on this subject, have turned so much on the peculiar laws of set-off of different countries, that we do not propose to consider them in detail.[1]

If an agent is answerable to his principal for a loss, either because he has for a commission guaranteed the policy, or because he is answerable for his negligence in not procuring any, or any sufficient insurance, he is, in respect to salvage, subrogated to his principal's rights, and may have his claim for salvage, or any similar allowance.

If a principal could sue his insurers only by making an abandonment, and sues not them but an agent by whose fault the insurance failed to be made, it seems that there must be an abandonment to him to convert a partial into a constructive total loss.[2]

An agent on commission, paying a loss guaranteed by him, may, it seems, sue the insurers in the name of the insured, if the policy be payable only to him, or in his own name, if the policy be made out to him.[3]

An agent may be liable to the insurers for the premium. But he can be liable for nothing more than his principal is or would be liable, if there were no agency.[4]

[1] The English cases are fully considered by Mr. *Arnould*, Vol. 1, p. 115–126. See also, Olive *v.* Smith, 5 Taunt. 56; Rose *v.* Hart, 8 Taunt. 499; Young *v.* Bank of Bengal, 1 Moore, P. C. 150; Dixon *v.* Stansfeld, 10 C. B. 398, 11 Eng. L. & Eq. 528; Leeds *v.* Marine Ins. Co., 6 Wheat. 565; Moody *v.* Webster, 3 Pick. 424.

[2] See 2 Duer, Ins. 326.

[3] See 2 Duer, Ins. 336.

[4] See Shee *v.* Clarkson, 12 East, 507; Phœnix Ins. Co. *v.* Fiquet, 7 Johns, 383.

SECTION V.

OF VOLUNTARY AGENTS.

There are three kinds of voluntary insurance agents: or, to express our meaning more accurately, three classes of persons have been called voluntary insurance agents.

A. Those who, without authority or request, express or implied, and without payment made or promised in any way, voluntarily undertake to effect insurance, or do something in relation to a contract of insurance.

B. Those who undertake to do this because they are so requested, but to whom no payment is made, or promised in any way.

C. Those who are factors, or general agents, of, or have some other business relating to the insured, by reason of which they effect insurance, or act for the insured in relation to it.

Of the class C. we have already said all that seems to be necessary, and shall confine our remarks to the other two classes.

Of class A.

Any such contract, or act, by any agent of this class, may be ratified by the alleged principal, provided it purport to be made by him as agent, and provided the whole transaction is in good faith, and the ratification, as to time, manner, and all other circumstances, works no injustice to the insurers, and such a ratification accepts and adopts the whole contract with all its obligations as well as all its rights. This subject of ratification has been also considered. One question however is suggested by text-writers, although it has never been submitted to adjudication. It is this. If an agent exceeds his authority, and the principal is informed thereof, and does not with reasonable promptitude disclaim the act, he will, in general, be regarded as adopting and ratifying. But, if we suppose him to be perfectly silent, when informed by insurers of an insurance effected in this gratuitous and officious way, the question may arise, Is this

an adoption or a rejection? We apprehend that the circumstances of each case must aid in deciding this question; but, generally, we think, that it should be regarded as a rejection; and should have the effect of a declaration by the alleged principal that he would have nothing to do with it. If this be so, the insurers could not hold him for the premium; nor could he, by any act, after once rejecting it by a sufficient silence, adopt and ratify it so as to derive any benefit from it, unless with the consent of the insurers.

If such a contract or act be ratified, the self-created agent may claim of his principal all his reasonable and proper expenses in the matter; and also a proper charge or commission for services which have thus been accepted, where the circumstances indicated that he did not consider himself as *giving* his assistance, but as acting as a business agent, for pay. It might be, however, that he rendered his aid only as a *gift*, and that it was accepted as such; but we think that the burden of proof would lie on the acceptor to prove this. If the contract or act be not ratified, the agent has, of course, no claim whatever against the party whom, without his request, he sought to make his principal or employer, but who did not accept this relation.

Of class B.

Concerning a requested, but gratuitous or unremunerated agent, we have more difficulty. Doubtless the principal would now be held for the acts of such agent without any further ratification. And every agent, in our judgment, has (unless there be a waiver or a gift on his part) a claim not only for his reasonable expenses, but also for his reasonable compensation. But this question involves another which seems to have been considered as of some importance.

A contract, or a transaction of this kind, has been learnedly and elaborately considered in a case in New York.[1] The law which has been inferred from it is, first, that a person so requested to effect insurance, and promising to do it, and having attempted or begun to do it, or having done something of, or in or about the transaction, but not in such a way as to

[1] Thorne *v.* Deas, 4 Johns. 84.

make a valid insurance, would be liable to the party making the request. And secondly, that if he is requested, but is neither paid nor promised any thing, and agrees to do as requested, and without excuse does nothing whatever, he is not liable at all, for want of compensation, or of consideration for his promise.

These conclusions have been generally assented to by those who have had occasion to speak of them. We think them, however, open to some exception or qualification. The distinction between him who does nothing, or who begins but does not finish, and him who does in a wrong way what he does, rests upon no other foundation that we can discern, than the difference between nonfeasance, and misfeasance or malfeasance. For the first, he is not answerable, either *ex contractu* or *ex delicto;* because no action lies against him, for simply leaving that undone which he was not bound to do; while he who injures another, by any misfeasance or malfeasance, is liable for the tort. We are not without some doubt, whether, under this distinction, there must not be more than a mere beginning, more than an incomplete doing of that which needed not to be done at all, and something which is enough more than this to constitute a positive tort, in order to make a wholly unremunerated agent, liable.[1]

[1] In Thorne *v.* Deas, the plaintiffs were copartners, and joint owners of one half of a vessel, and the defendant was sole owner of the other half of the same. On the day the vessel sailed on a voyage, one of the plaintiffs requested the defendant to effect insurance on the vessel; this the defendant promised to do, and repeated the promise some days afterwards; but never did it. The vessel was lost, uninsured, and an action on the case was brought for the nonfeasance. The court held that the action could not be maintained; *Kent*, C. J., saying, "That by the common law, a *mandatary*, or one who undertakes to do an act for another, without reward, is only responsible when he attempts to do it, and does it amiss. In other words he is responsible for a *misfeasance*, but not for a *nonfeasance*, even though special damages are averred." In the second volume of his commentaries, p. 570, he refers to this case, and repeats as unquestionable law, the rule there laid down. And yet, we should hesitate to admit that there was any such important difference in law (there is no such difference in fact), between not beginning to do what one has promised, and "attempting" or barely beginning and leaving off at once. The cases cited in Thorne *v.* Deas (which were most elaborately argued as well as decided), lead to no other conclusion than this: that he who, without consideration, promises, and does nothing, "has merely told a falsehood" (says *Kenyon*, C. J., in Elsee *v.* Gatward, 5 T. R. 143), for which no action lies. But if he has actually done something, and so done it as to have inflicted an injury, he is liable for the *misfeasance*. But the very definition of *misfeasance* (to distinguish it from *malfeasance* on the one side, and *nonfeasance* on the

But we have some difficulty with the second conclusion also. Chancellor *Kent* throughout this case, seems to consider it as

other) is, the doing of some lawful act, in an unlawful way. See 2 Vin. Abr. 35, Doct. Pl. 62. Now, the mere "attempting to do," to use the words of the court in Thorne *v.* Deas, does not seem to us, enough to constitute, of itself, actual misfeasance. In French *v.* Reed, 6 Binn. 308, the case of Thorne *v.* Deas (under the name of Thornbury *v.* Day) is referred to and approved; but without any extended consideration of the reasons or authorities. In England, in Wilkinson *v.* Coverdale, 1 Esp. 75, Erskine, cited from manuscript, Wallace *v.* Tellfair, wherein *Buller*, J., held, that, "where a party voluntarily undertook to procure insurance, and proceeded to carry his undertaking into effect by getting a policy underwritten, but did it so negligently or unskilfully, that the party could derive no advantage from it, he should be liable to an action." And "Lord *Kenyon* acquiesced in the decision, and suffered the cause to proceed;" but the plaintiff failed to prove any promise, and was nonsuited. In Balfe *v.* West, 13 C. B. 466, 22 Eng. L. & Eq. 506, a somewhat similar question was presented. The head note is, "One who gratuitously accepts the office of steward of a horserace, is not responsible for a loss resulting to one who enters a horse for the race, from his mere nonfeasance in omitting to appoint a judge, — *at all events*, unless it appears that he has actually entered upon the duties of the office." The words we have italicized implying that the reporter understood the court as leaving it in doubt, whether the defendant would even then have been responsible. There was a general demurrer to the declaration, and it appeared on the argument, that the declaration did not show that the defendants entered upon the execution of the office. Garth, for the plaintiffs, said, "It must be conceded, that, if this declaration does not show that the defendants had actually undertaken the office of stewards, the action cannot be maintained. In that respect, probably, the court will allow the plaintiff to amend." *Jervis*, C. J. "You may amend on the usual terms." *Cresswell*, J. "You must not assume that the court gives you the slightest hint, that you can sustain your declaration with the proposed amendment." In the course of the trial, *Jervis*, C. J., said: "The rule is well put in Smith's Mercantile Law: 'If he [an unremunerated agent] do commence his task, and afterwards be guilty of misconduct in performing, he will, though unremunerated, be liable for the damage so occasioned; since, by entering upon the business, he has prevented the employment of some better qualified person; and the detriment thus occasioned to his principal, is a sufficient consideration to uphold an undertaking on his part, to act with care and fidelity.'" The reason here given for the rule, qualifies and construes it. One who promises and does nothing, may cause as much damage and as effectually prevent the employment, as if he promises and barely begins to perform, or in Kent's words, "attempts to do it," and stops at once; but still he is not, and we think neither of them would be liable. And it is to be remembered, that the decision in Thorne *v.* Deas, so far as it relates to what would make an agent to whom no compensation had been *promised*, responsible, is altogether obiter, as the whole case proceeds on the supposition that the defendant was wholly unremunerated, and rests on that ground. Upon the whole, an examination of all the authorities satisfies us, that the true distinction is not between one who, without remuneration, after a promise to do, attempts or begins to do, and only begins or attempts to do, — but between him who, on the one hand, promises and either does nothing or so little that is only as injurious as nothing would be, and him, on the other hand, who after such a promise, injures the party to whom

arising under the law of mandate, and perhaps as under the law of bailment. Certainly it was not a case of bailment, for nothing whatever was bailed, and nothing whatever was received; nor was it a case of mandate, if a mandatary, as commonly defined, and by Kent himself,[1] is a gratuitous bailee, who is requested to do or have something done about the thing bailed.

A mandate, however, may perhaps be only a voluntary commission, offered and undertaken, wholly without compensation; and in this sense, the defendant in Thorne *v.* Deas was perhaps a mandatary.

The essential question upon which this case actually depended, was this: was the defendant a gratuitous accepter of a commission? The court came to the conclusion, from the attendant circumstances, that he had never intended to ask or receive a compensation, and would have had no right whatever to demand one, had he performed the service. And if this be assumed, there can be no doubt whatever, that the case was decided aright.

The general rule, however, must be this: if A asks B to render him a service, and B. agrees to do it, and does it, B thereby acquires a right to demand from A a reasonable compensation, which A is accordingly bound to pay. And this obligation of A to pay for the service when rendered, is a good consideration for the promise to render it.

We doubt whether there be any exception to this rule. But there certainly may be a waiver of the right of the agent or servant to his compensation, which may be express, or it may be implied from some special relation of the parties, or any circumstances which indicate an agreement or understanding of the parties that there shall be no pay for the service. We are however quite confident that this waiver cannot be always, or even

the promise is given, either by doing a wrong thing, which would be *malfeasance*, or by doing a right thing in a wrongful and injurious way, which would be *misfeasance*.

[1] 2 Kent, 558. So it seems to be considered as belonging to the law of bailment, in 1 Smith's L. C. 82, and cases gathered to illustrate Coggs *v.* Bernard. But we consider that the delivery and acceptance of any letter, or parcel, or money, or note, or indeed of any chattel, makes a new case of it, and brings in a new consideration. Durnford *v.* Patterson, 7 Mart. La. 460; Shillabeer *v.* Glyn, 2 M. & W. 145; Robinson *v.* Threadgill, 13 Ired. 39; Whitehead *v.* Greetham, 2 Bing. 464, 1 McLellan & Y. 205, and 10 J. B. Moore, 183.

generally, implied from the mere silence of the parties in relation to the compensation.

We should say, therefore, that the general rule of law is, that one acting in regard to insurance transactions by the request of another, acquired a right to compensation, as perfect as if he stipulated for pay and it were promised him. And that if he did the work well, or did it ill, or neglected to do it at all, his rights, and the rights of others in respect to him, would be much the same as if he were a common paid agent.

CHAPTER XV.

OF THE RIGHTS OF ACTION; AND OF EVIDENCE.

THE rights and the forms of action, and the laws of evidence are the same in relation to contracts of insurance, that they are in relation to other contracts, excepting so far as the peculiar nature of these contracts has caused some qualification of the general rules. As we cannot give here a treatise on pleading or on evidence, we shall state little more than those rules which appear to apply to contracts of insurance specifically.

It may be well to remark that the action, if the policy is not sealed, should be assumpsit;[1] and if it be sealed, debt (as provided by English statutes)[2] or covenant;[3] or in States where these forms of action are superseded, by the special declarations which take their place.

If a policy under seal by its terms expires within a given time, and contains a clause for its renewal on payment of an annual premium, and this is done and the renewal indorsed on

[1] In Kennedy *v.* Baltimore Ins. Co., 3 Harris & J. 367, it was held that assumpsit would lie against a corporation for money had and received for the benefit of the insured.

[2] See 2 Marsh. Ins. 693. If an action of debt is brought, the plaintiff may recover a less sum than that demanded in the writ, where an entire sum is demanded, and it is shown by the counts to consist of several distinct accounts, or where the precise sum demanded is diminished by extrinsic circumstances. Hughes *v.* Union Ins. Co., 8 Wheat. 294.

[3] Smith *v.* Universal Ins. Co., 6 Wheat. 176; Sullivan *v.* Massachusetts Mut. F. Ins. Co., 2 Mass. 318; Stetson *v.* Massachusetts Mut. F. Ins. Co., 4 Mass. 330; Watson *v.* Ins. Co. of North America, 1 Binn. 47; Baltimore Ins. Co. *v.* Taylor, 3 Harris & J. 198. In New York, an early statute declared that policies executed in a certain way, though not under seal, should have the effect of policies under seal, and allowed the party to sue either in covenant, or on the case. Ferriss *v.* North American F. Ins. Co., 1 Hill, 71, 73.

the policy, it has been held that unless the indorsements are under seal, the insured cannot maintain an action of covenant on the policy.[1]

SECTION I.

WHO MAY BRING AN ACTION ON THE POLICY.

The insured, by name, can, of course, sue on the policy. But if A be insured "for whom it may concern," or if other language is used of similar meaning and effect, A may bring an action for the benefit of all concerned;[2] or the party insured under such a clause, without being named, may bring an action in his own name.[3] It has usually been said, that this was true only of policies not under seal; and the technical rules of law would appear to confine it thus. But a recent case in England, seems to extend it to sealed policies, by reasoning which is certainly ingenious if not convincing.[4] If A is insured "for B;" or if A is insured "the loss payable to B," it is still more obvious that B may sue in his own name.[5] And the party in interest may also bring the action in his own name.[6]

[1] Luciani *v.* American F. Ins. Co., 2 Whart. 167.

[2] Davis *v.* Boardman, 12 Mass. 80; Ward *v.* Wood, 13 Mass. 539; Copeland *v.* Mercantile Ins. Co., 6 Pick. 198.

[3] Finney *v.* Fairhaven Ins. Co., 5 Met. 192; Oliver *v.* Commercial Mut. Mar. Ins. Co., 2 Curtis, C. C. 277; Blanchard *v.* Waite, 28 Maine, 51; Ruan *v.* Gardner, 1 Wash. C. C. 145; Williams *v.* Ocean Ins. Co., 2 Met. 303. In Maryland Ins. Co. *v.* Graham, 3 Harris & J. 62, the policy declared that A B and C D for account of E F, do make insurance, and cause themselves and their, and every one of them to be insured. It was held that E F might bring a suit in his own name.

[4] Sunderland Marine Ins. Co. *v.* Kearney, 16 Q. B. 925. This proceeds on the ground that it is not necessary that a person's name be set forth, but that it is sufficient if he be sufficiently designated in the deed, and that when insurance is made in such a way that the interests of third persons are covered, the covenant is with them, as well as with the person whose name is mentioned. In this country the action is generally brought in the name of the person procuring the insurance, unless the others interested are specifically designated, and there are dicta in some of the authorities to the effect, that no action would lie except in the name of the party mentioned. See American Ins. Co. *v.* Insley, 7 Barr, 223; De Bollè *v.* Pennsylvania Ins. Co., 4 Whart. 68.

[5] Motley *v.* Manufacturers' Ins. Co., 29 Me. 337.

[6] In Farrow *v.* Commonwealth Ins. Co., 18 Pick. 53, the agents of the owners were

But no person can maintain an action on a policy, unless he has an actual interest in the subject-matter of the insurance, and also in the policy or contract.[1] Thus, if a mortgagor is insured for his own benefit, the mortgagee cannot sue on that policy, either in his own name or in that of the mortgagor; at law or in equity.[2] But if the mortgagor or his lessee makes the policy for the benefit of the mortgagee, the mortgagee may adopt it.[3]

It may be remarked, that if a mortgagee causes himself to be insured for his own benefit, he cannot charge the premium to the mortgagor, unless there be a bargain between them to that effect.[4]

If persons are jointly insured, they must sue jointly.[5]

But if the policy be in the name of two or more, but only one of them named has any interest in the subject-matter, and the policy is so worded as to cover his interest, he may sue alone.[6] And if there be two insured in one policy, and a joint action is brought, it seems that the several and separate interest of each may be proved.[7] If the suit is commenced in the name of the nominal assured, for the benefit of several persons, and one of them revokes the authority of the plaintiff to recover his interest,

insured, loss payable to the agents. The insurance was declared to be for the owners, and it was held that they could maintain an action in their own names, the agents having assented to it. In Williams *v.* Ocean Ins. Co., 2 Met. 303, A was insured for whom it concerned. It was stated on the back of the policy that the insurance attached for A, B, and C, each one third, payable to A. It was held that A, B, and C might join in an action on the policy. In Jackson *v.* Farmers' Mut. F. Ins. Co., 5 Gray, 52, A was insured for $1,200, "in case of loss payable to J. S., mortgagee, to amount of $400." It was held that if the mortgagee assented, the insured might sue in his own name, although the loss was less than $400.

[1] See cases ante, p. 30, n. 1.

[2] Columbia Ins. Co. *v.* Lawrence, 10 Pet. 507.

[3] Motley *v.* Manufacturers' Ins. Co., 29 Maine, 337.

[4] Saunders *v.* Frost, 5 Pick. 259.

[5] Blanchard *v.* Dyer, 21 Maine, 111.

[6] Marsh *v.* Robinson, 4 Esp. 98. The policy in this case was effected in the names of Elizabeth Marsh & Son. The action was brought in the name of the son, who averred that he was solely interested; and *Le Blanc*, J., was of the opinion "That this averment let in the plaintiff to prove a sole interest in himself, notwithstanding the policy bore the joint names of two."

[7] M'Cormick *v.* Ferrier, Hayes & Jones, 12.

this does not affect the right of the insured to recover for the benefit of the other parties in interest.[1]

An assignee must, generally, bring a suit in the name of the assignor.[2] But if there be a promise of the insurers to the assignee, he may bring the action in his own name.[3] And in

[1] Copeland *v.* Mercantile Ins. Co., 6 Pick. 198.

[2] Hobbs *v.* Memphis Ins. Co., 1 Sneed, 144; Jessel *v.* Williamsburgh Ins. Co., 3 Hill, 88. The policy in this latter case contained the usual clause, that the interest of the insured should not be assigned without the consent of the corporation. The insured assigned his interest with their consent, and the assignee sued in his own name. The court held that the action should have been brought in the name of the assignor, and the plaintiff was therefore nonsuited. But, in Louisiana, it seems that the assignees might maintain an action, in their own names, in such a case. Hermann *v.* Louisiana State Ins. Co., 7 La. 502.

[3] The general principle of law is well settled that an assignment of a chose in action, with the consent of the debtor, gives the assignee the right to sue upon it in his own name. Currier *v.* Hodgdon, 3 N. H. 82; Morse *v.* Bellows, 7 id. 549, 565; Moar *v.* Wright, 1 Vt. 57; Bucklin *v.* Ward, 7 id. 195; Hodges *v.* Eastman, 12 id. 358; Smith *v.* Berry, 18 Maine, 122; Warren *v.* Wheeler, 21 id. 484; Barger *v.* Collins, 7 Harris & J. 213, 219; Thompson *v.* Emery, 7 Foster, 269. The same is true of the contract of insurance. Wiggin *v.* American Ins. Co., 18 Pick. 158; Wiggin *v.* Suffolk Ins. Co., id. 145; Wilson *v.* Hill, 3 Met. 66; Fogg *v.* Middlesex Mut. F. Ins. Co., 10 Cush. 337, 345; Phillips *v.* Merrimack Mut. Ins. Co., 10 Cush. 350; Flanagan *v.* Camden Mut. Ins. Co., 1 Dutch. 506. In Folsom *v.* Belknap Co. Mut. F. Ins. Co., 10 Foster, 231, it was said that if the charter or by-laws of a mutual company contain a provision that an assignee may become a member of the company, if the assignment is made and ratified, he may sue in his own name. But, in this case there being no such provision, it was held that, although the assignment had been agreed to, yet the action should have been brought in the name of the assignor. In Bodle *v.* Chenango Co. Mut. Ins. Co., 2 Comst. 53, A effected insurance in his own name, on certain goods, and then sold part of them to B, but did not transfer the policy. The defendants agreed that the insurance might stand. A loss having occurred, an action was brought in the names of both in a court of equity. Held that this was the proper and only form of relief, for an action at law would not lie in such a case in the names of both. If the act of incorporation allows the assignee to sue in his own name, if the subject has been transferred to him, he must aver that he became the purchaser, or assignee of the subject-matter insured, and a general averment that he became and was interested in the buildings insured, and that the insured transferred all his right, and interest in the policy to him is not sufficient. Granger *v.* Howard Ins. Co., 5 Wend. 200. And, in such a case, if A and B are insured jointly, and A sells out to B, it has been held that no action will lie in the names of A and B, for the assignee should sue in his own name. Ferriss *v.* North American F. Ins. Co., 1 Hill, 71; Mann *v.* Herkimer Co. Mut. Ins. Co., 4 Hill, 187; Murdock *v.* Chenango Co. Mut. Ins. Co., 2 Comst. 210; Howard *v.* Albany Ins. Co., 3 Denio, 301; Conover *v.* Mut. Ins. Co. of Albany, id. 254. In Tennessee, the action must be in the name of the assignors for the benefit of the assignee. Hobbs *v.* Memphis Ins. Co., 1 Sneed, 444.

some of our States, assignees of choses in action, may bring actions in their own name; but subject to all equities of defence.

In some policies there is a provision that an assignee (usually one who is such with the knowledge and consent of the insurers) may bring an action upon it in his own name. And this applies to an assignment made during the continuance of the risk.[1]

SECTION II.

AGAINST WHOM, AND WHEN THE ACTION MAY BE BROUGHT.

If there be double insurance, it may be brought against all the insurers, or either severally; and the insurer who pays will have his claim for contribution against the others.[2] And the same rule is applied where there are several distinct underwriters on the same policy. This is now unusual in this country; and not so common as it once was in England. And there it is usual in such cases to enter into what is called "a consolidation rule," the effect of which is, that all the suits and rights of action await and abide the decision of one of them.[3]

There may be an action at law on an agreement to make out and give a policy;[4] or an action of trover for a policy if it is made out; and this last action is said to lie where an agent writes that he has effected a policy, and has not.[5] So a bill in equity may be brought for a policy duly executed,[6] or to correct

[1] See Ferriss *v.* North American F. Ins. Co., 1 Hill, 71; Carter *v.* United Ins. Co., 1 Johns. Ch. 463.

[2] Newby *v.* Reed, 1 W. Bl. 416; Wiggin *v.* Suffolk Ins. Co., 18 Pick. 145.

[3] This practice is so peculiarly a part of English jurisprudence, that we do not think it necessary to treat of it at length. The learned reader will find it fully discussed in 2 Arnould on Ins. 1277–1285.

[4] Hamilton *v.* Lycoming Mut. Ins. Co., 5 Barr, 329. See also, Tayloe *v.* Merchants' Fire Ins. Co., 9 How. 390, 405, per *Nelson*, J. If the policy is made out but not delivered, an action of assumpsit will lie on the contract. Blanchard *v.* Waite, 28 Maine, 51; Loring *v.* Proctor, 22 id. 18.

[5] Harding *v.* Carter, Park, Ins. 4.

[6] Perkins *v.* Washington Ins. Co., 4 Cow. 645, 6 Johns. Ch. 485; Palm *v.* Medina Co. Mut. F. Ins. Co., 20 Ohio, 529. And when a court of equity has acquired jurisdiction of the case, it will proceed and give final relief, and not turn the party over to

errors in a policy, where the remedy at law is imperfect or inadequate.[1]

Insurers who accept an abandonment made to them, acquire thereby, in general, the rights of action of the insured, which refer to the subject-matters insured; but they must bring the actions, as assignees, that is, in the names of the insured.[2]

Policies sometimes stipulate that the insurers shall not be bound to pay the loss, until sixty days, or ninety days, or some other period, after proof of loss. This means after the usual and customary preliminary proof; and not the full and legal evidence necessary to maintain the action.[3]

This proof must depend upon all the circumstances of the case. Thus, if the master is a prisoner, and is therefore unable to make a protest, less strict evidence of the loss is required.[4] So if there are special provisions in the policy which make the

an action at law on the policy. Tayloe *v.* Merchants' Fire Ins. Co., 9 How. 390; Union Mut. Ins. Co. *v.* Commercial Mut. M. Ins. Co., 2 Curtis, C. C. 524, 19 How. 318.

[1] See ante, p. 38, n. 2.

[2] See ante, ch. 10, s. ix. p. 416, and p. 418, n. 2.

[3] In Lawrence *v.* Ocean Ins. Co., 11 Johns. 241, 260, the law on this subject is stated by *Thompson*, C. J., as follows: "The clause in the policy making preliminary proof necessary, before payment of the loss can be demanded, requires only reasonable information to be given to the underwriters, so that they may be able to form some estimate of their rights and duties, before they are obliged to pay; this clause has always been liberally expounded, and is construed to require only the best evidence which the party possessed at the time." See also, Child *v.* Sun Mut. Ins. Co., 3 Sandf. 26; Talcot *v.* Mar. Ins. Co., 2 Johns. 130; Barker *v.* Phœnix Ins. Co., 8 id. 307. But the insurer is entitled to all the documents which the insured has. Those generally presented are the protest of the master, the surveys, all communications which have been received, and in the case of the cargo, the bill of lading and invoice. See Allegre *v.* Maryland Ins. Co., 6 Harris & J. 408, where it was held that the insurers were entitled to receive the invoice of the cargo. And although a document would not be admissible in evidence in a suit on the policy, yet if it is material it should be exhibited to the insurers as a part of the preliminary proof. American Ins. Co. *v.* Francia, 9 Barr, 390.

[4] Munson *v.* New England Mar. Ins. Co., 4 Mass. 88. In Child *v.* Sun Mut. Ins. Co., 3 Sandf. 26, one of the owners, who was the managing agent in whose name the policy was effected, produced the register of the ship, and made an affidavit that the vessel had sailed twenty months before from the Sandwich Islands, and had not been heard from for fifteen months. It was held that this was sufficient proof of the loss. So an abandonment may be made on the information which the insured have received of the loss, and before they are in the possession of the protest. Craig *v.* United Ins. Co., 6 Johns. 226, 249. See also, Barker *v.* Phœnix Ins. Co., 8 Johns. 307.

production of certain documents of great importance, the insured is bound to produce them, or to account for their non-production, as the survey, under what is called the "rotten clause."[1] The insurer may, however, waive his right to have full preliminary proofs presented, and he does this by refusing to pay the loss, such refusal not being based on any objection to the proofs.[2] When the policy contains the clause in respect to time, mentioned on the preceding page, the right of action does not, of course, begin until the specified period has elapsed after the proof is presented.[3] There is in some policies, at least in fire policies, a clause requiring that the action shall be brought within six months (or some other definite period) after the occurrence of the loss. And this clause has been held to be valid.[4] But a pro-

[1] Haff *v.* Marine Ins. Co., 4 Johns. 132, Anthon, N. P. 14.

[2] Francis *v.* Ocean Ins. Co., 6 Cow. 404; Ocean Ins. Co. *v.* Francis, 2 Wend. 64; M'Intyre *v.* Bowne, 1 Johns. 229; Vos *v.* Robinson, 9 Johns. 192; Martin *v.* Fishing Ins. Co., 20 Pick. 389; Allegre *v.* Maryland Ins. Co., 6 Harris & J. 408. In Child *v.* Sun Mutual Ins. Co., 3 Sandf. 26, it was held that if the preliminary proofs are not objected to, they are presumed to be waived. In Johnston *v.* Columbian Ins. Co., 7 Johns. 315, the preliminary proofs were submitted by the insurers to their agent, who stated the amount of the loss to be partial, and this was paid into court. It was held that the act of the agent admitted the sufficiency of the proof in the first instance, and that the payment of the money into court admitted that the insured had a cause of action. But where the president of an insurance company, on being asked what further proof was required, answered, "The policy will show," it was held that the answer was not a tacit admission that there was no objection taken to any defect in the preliminary proof that had been furnished, nor a waiver of such proof. Spring Garden Mut. Ins. Co. *v.* Evans, 9 Md. 1.

[3] Bryant *v.* Commonwealth Ins. Co., 6 Pick. 131; Camberling *v.* M'Call, 2 Yeates, 281, 2 Dall. 280; Barker *v.* Phœnix Ins. Co., 8 Johns. 307; Ames *v.* New York Union Ins. Co., 4 Kern. 253. In Allegre *v.* Maryland Ins. Co., 6 Harris & J. 408, it is held that the stipulation of the parties that the loss is to be paid in a certain time, looks only to the case of an amicable adjustment by themselves; and that when this cannot be made, the insured is absolved from the operation of the stipulation, and the right of action immediately accrues. This question is one which is of much importance in the law of contracts generally, and we have considered it in our work on that subject. See 2 Parsons on Contracts, 179. On the authorities there cited we do not consider it as yet settled whether a mere refusal to perform an act which the party has, by the terms of his contract, till a certain day to perform, will give the right of immediate action, though if he incapacitates himself from the performing it, it would seem that the right of action accrues at once.

[4] Cray *v.* Hartford Ins. Co., 1 Blatchf. C. C. 280; Wilson *v.* Ætna Ins. Co., 27 Vt. 99; Amesbury *v.* Bowditch Mut. F. Ins. Co., 6 Gray, 596; Ketchum *v.* Protection Ins. Co., 1 Allen, 136. And in Fullam *v.* New York Union Ins. Co., 7 Gray, 61, it was held that it did not take the case out of the general rule that the company was a stock company and doing business in another State. In

vision that a suit shall be brought in the county where the insurer has his place of business, has been held not to be binding on the parties,[1] though the distinction which is made between these two clauses, seems to us to be somewhat nice.[2] But it is clear

Wilson *v.* Ætna Ins. Co., the action was commenced within the time specified, but the plaintiff, without fault on his part, became nonsuit in consequence of a defect in the proof of the destruction of the policy which was destroyed with the property insured. Another action was then commenced after the expiration of the time, and the court held that it was too late. But in French *v.* Lafayette Ins. Co., 5 McLean, 461, it was held that such a clause was of no effect.

[1] Nute *v.* Hamilton Mut. Ins. Co., 6 Gray, 174; Hall *v.* People's Mut. F. Ins. Co., id. 185. But as in Massachusetts all acts of incorporation are made public acts (Rev. Stats. c. 2, § 3), the legislature, by providing in an act of incorporation that all suits in certain cases shall be brought in a particular county, thereby repeals to this extent all other public acts which are inconsistent therewith, and a suit can be brought in the cases specified only in the particular county, but such an act is to be construed strictly, and if the precise case pointed out does not occur, the insured may bring his action in any county. Boynton *v.* Middlesex Mut. F. Ins. Co., 4 Met. 212.

[2] The reason for this difference between the two classes of cases is thus stated by *Shaw*, C. J., in Nute *v.* Hamilton Mut. Ins. Co., 6 Gray, 174, 180: "The time within which money shall be paid, land conveyed, a debt released, and the like, are all matters of contract, and depend on the will and act of the parties; but in case of breach, the tribunal before which a remedy is to be sought, the means and processes by which it is to be conducted, affect the remedy, and are created and regulated by law. The stipulation, that a contracting party shall not be liable to pay money, or perform any other collateral act, before a certain time, is a regulation of the right, too familiar to require illustration; a stipulation, that his obligation shall cease if payment or other performance is not demanded before a certain time, seems equally a matter affecting the right. A stipulation, that an action shall not be brought after a certain day, or the happening of a certain event, although, in words, it may seem to be a contract respecting the remedy, yet it is so in words only; in legal effect it is a stipulation that a right shall cease and determine if not pursued in a particular way within a limited time, and then it is a fit subject for contract, affecting the right created by it." It is, however, difficult to see why the time in which the action is to be commenced, is not part of the remedy as much as the place where the same shall be brought. The case of French *v.* Lafayette Ins. Co., 5 McLean, 461, was decided on the ground that the clause as to time affected the remedy and not the contract, and that as the statute of limitations prescribed the proper time in which a suit might be brought, which was the time fixed by the policy of the law, the clause fixing a different time was in conflict with it, and therefore void, and was an attempt to discharge or bar a right of action before the right accrued, and was therefore contrary to the principle that a release can only operate upon an existing claim.

If this question, in reference to policies of insurance, may be illustrated by what has been held in regard to other agreements in delay or avoidance of rights of action, it might be said, that it has been held that an agreement not to sue on a note within twenty years is not good, and a suit may be brought within the time. Lowe *v.* Blair, 6 Blackf. 282. And in Berry *v.* Bates, 2 Blackf. 118, it was held that an agreement

that if the insurers by their acts prevent the insured from bringing a suit within the time specified, this will amount to a waiver of the clause.[1]

It has long been a settled principle, both in this country and in England, that the parties to a contract can not oust the courts of their jurisdiction by any agreement that all claims shall be submitted to arbitration.[2] And such a clause has been held to have no effect, although the matters in controversy have been referred to arbitrators and are still pending at the time of action brought.[3] Courts of equity have also refused to enforce a bill for the specific performance of an agreement to refer to arbitration, or to compel a party to appoint an arbitrator under such an agreement.[4] And where a case is referred to

under seal not to sue for a limited time could not be pleaded in bar, or as a release, but that the defendant must resort to his action for breach of the agreement. See also, Cuyler *v.* Cuyler, 2 Johns. 186; Harrison *v.* Close, id. 448.

[1] Ames *v.* New York Union Ins. Co., 4 Kern. 253. The policy in this case contained two clauses. One that the loss was to be paid within ninety days after proof of the loss, and the other that suit should be brought within six months after the loss. The loss took place July 5th. The proofs were furnished July 14th. A defect in them pointed out October 7th, and supplied October 14th. The application for payment was made January 2d, when the secretary of the company said it would not be due till the 14th, when it would be made. The company having refused to pay, an action was brought on the 18th of January, and the court held that it could be maintained. See also, Grant *v.* Lexington F. L. & M. Ins. Co., 5 Ind. 23.

[2] Kill *v.* Hollister, 1 Wils. 129; Thompson *v.* Charnock, 8 T. R. 139; Goldstone *v.* Osborn, 2 Car. & P. 550; Mitchell *v.* Harris, 2 Ves. 129; Wellington *v.* Mackintosh, 2 Atk. 569; Nichols *v.* Chalie, 14 Ves. 265; Robinson *v.* Georges Ins. Co., 17 Maine, 131; Hill *v.* More, 40 Maine, 515; Allegre *v.* Maryland Ins. Co., 6 Harris & J. 408; Gray *v.* Wilson, 4 Watts, 39; Contee *v.* Dawson, 2 Bland, 264; Randel *v.* Chesapeake & Delaware Canal Co., 1 Harring. Del. 233; Horton *v.* Stanley, 1 Miles, 418; Stone *v.* Dennis, 3 Porter, 231; Haggart *v.* Morgan, 4 Sandf. 198, 1 Seld. 422.

[3] Harris *v.* Reynolds, 7 Q. B. 71.

[4] Wellington *v.* Mackintosh, 2 Atk. 569; Street *v.* Rigby, 6 Ves. 815; Milnes *v.* Gery, 14 id. 400; Blundell *v.* Brettargh, 17 id. 232; Gourlay *v.* Duke of Somerset, 19 id. 429; Wilks *v.* Davis, 3 Meriv. 507; Agar *v.* Macklew, 2 Simons & S. 418; Mexborough *v.* Bower, 7 Beav. 127; Copper *v.* Wells, Saxton, 10; Tobey *v.* County of Bristol, 3 Story, 800. In Halfhed *v.* Jenning, 2 Dickens, 702, *nom.* Halfhide *v.* Fenning, 2 Bro. Ch. 336, a bill was brought by one partner against another and the representative of a deceased partner for an account and for a production and a discovery. The defendants pleaded that there was a clause in the articles that no bill or suit should be brought respecting the partnership, until the matter should have been referred to arbitration and the arbitrator should have made his award; and the plea was sustained. This decision has generally been considered as incorrectly decided, but it appears to us not to be opposed to the doctrine of the cases above cited, and is sustained by Lord

arbitration by consent, the court have refused to order the arbitrators to proceed.[1] But in England, in some late cases, the principles upon which these rules rest, have been questioned;[2] and it has been held that an agreement that the amount of damages to be recovered in an action at law, shall be first determined by arbitrators is binding, and that no action will lie till such an arbitration is had.[3] And even if an agreement to refer a

Chancellor *Sugden*, in Dimsdale *v.* Robertson, 2 Jones & La Touche, 58. In this case, a submission had been entered into by the parties, the arbitrators were designated, and their powers and duties fully pointed out. But before they had taken any proceedings, the plaintiff filed his bill alleging that the arbitrators could not do him justice under the powers conferred upon them. It is provided in England and Ireland by statute, that after the arbitrators are appointed in pursuance of any submission to reference, containing an agreement that such submission shall be made a rule of court, etc., that the submission cannot be revoked by either party without leave of court. The chancellor held, that the bill would not lie in this case, and the whole subject of the power of a court of equity in the premises was considered at length, and the case of Halfhide *v.* Fenning, was considered as correctly decided.

[1] Crawshay *v.* Collins, 1 Swanst. 40.

[2] In Scott *v.* Avery, 5 H. L. Cas. 811, 36 Eng. L. & Eq. 1, 13, *Creswell*, J., said: "The whole of the doctrine as to ousting the jurisdiction of the courts, appears to have been based upon the passage quoted by *Parke*, B., in 8 Exch. 494, from Co. Litt. 536: 'If a man makes a lease for life, and by deed grants that if any waste or destruction be done, it shall be redressed by neighbors, and not by suit or plea, notwithstanding an action of waste shall lie, for the place wasted cannot be recovered without plea.' The case is not to be found in the Year Book, 3 Edw. 3, referred to, but is in Fitz. Ab., 'Waste,' pl. 5; and the whole of it is given in Co. Litt. 536. It seems, that this decision proceeded on the ground that the neighbors could not redress the wrong done; that it could only be done by plea; therefore, notwithstanding the deed, an action of waste would lie. There is not a word leading to the supposition, that an action would have been maintainable, if the neighbors could have given the appropriate redress; or that it might not have been granted by deed, that if a dispute arose about waste, neighbors should say whether there had been waste or not. But in subsequent cases, it has been considered to have established that parties cannot by agreement, oust the jurisdiction of the courts of the realm."

And in Russell *v.* Pellegrini, 6 Ellis & B. 1020, 38 Eng. L. & Eq. 99, Lord *Campbell*, C. J., said: "For some time the courts had a great horror of arbitrations, and doubts were entertained, whether a clause for referring matters in dispute, introduced in an agreement, was not illegal. But I cannot imagine why parties should not be allowed to settle their differences in the manner which they think most convenient. When a cause of action has arisen, the courts are not to be ousted of their jurisdiction; but parties may come to an agreement that they shall be no cause of action, until their differences have been referred to arbitration."

[3] In Scott *v.* Avery, 8 Exch. 487; 20 Eng. L. & Eq. 327, the policy contained the clause: "that the sum to be paid to any suffering member for any loss or damage, shall, in the first instance, be ascertained and settled by the committee; and the suffering member, if he agrees to accept such sum in full satisfaction of his claim, shall be

case to arbitration is invalid, so that it cannot be pleaded in bar to a suit, yet it has been held, that an action for damages will lie for the breach.[1]

In England, it is now provided by statute, that whenever there is an agreement in any written instrument, to refer a cause to arbitration, and a suit is brought, the court may grant a rule to stay proceedings at the request of the defendants.[2]

entitled to demand and sue for the same, as soon as the amount to be paid has been ascertained and settled and not before, which can only be claimed according to the customary mode of payment in use by the society." The arbitration clause followed immediately after this, which provided that in case of any difference between the committee and any member relative to the settlement of any loss or damage or any other matter relating to the insurance, arbitrators should be appointed, etc., and it was also provided, that "the obtaining the decision of such arbitrators on the matters and claims in dispute, is hereby declared to be a condition precedent to the right of any member to maintain any such action or suit." The defendants' plea set forth that a difference had arisen between the committee and the insured relative to the extent of the loss, that the amount had, therefore, never been ascertained and that the defendants were, and always had been ready and willing to have the same decided by arbitrators, but the plaintiff was not ready and willing so to do, and that the loss had not been settled or ascertained by arbitrators. On demurrer, the Court of Exchequer gave judgment for the plaintiff. But in the Exchequer Chamber the judgment was reversed, on the ground, that the provisions mentioned did not oust the courts of their jurisdiction, but merely provided that the amount should be ascertained in a certain way, before the party was at liberty to sue; and that this was in the nature of a condition precedent. Avery *v.* Scott, 8 Exch. 497, 20 Eng. L. & Eq. 334. This decision was affirmed in the House of Lords, 5 H. L. Cas. 811, 36 Eng. L. & Eq. 1, *Martin*, B., *Alderson*, B., and *Crompton*, J., dissenting. Lord Chancellor *Cranworth*, stated the law, as follows: "If I covenant with A. not to do a particular act, and it is agreed between us that any question which might arise, should be decided by an arbitrator without bringing an action, then a plea to that effect would be no bar to an action; but if we agreed that J. S. was to award the amount of damages to be recoverable at law, then if such arbitration did not take place, no action could be brought."

[1] Livingstone *v.* Ralli, 5 Ellis & B. 132, 30 Eng. L. & Eq. 279. This doctrine was doubted in Tattersall *v.* Groote, 2 B. & P. 131.

[2] 17 & 18 Vict. c. 125, § 11. This statute provides, that "Whenever the parties to any deed or instrument in writing to be hereafter made or executed, or any of them shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them shall, nevertheless, commence any action at law or suit in equity against the other party or parties or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred or any of them, it shall be lawful for the court in which such action or suit is brought or a judge thereof, on application by the defendants or any of them after appearance and before plea or answer, upon being satisfied that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration, according to such agreement as aforesaid, and that the defendant was,

In this country, it has been held, that if the insurance company takes possession of the vessel and proceeds to repair her, with the view thus to make good the loss, this amounts to a waiver of the submission to arbitration.[1]

SECTION III.

OF THE EVIDENCE.

There are few rules or usages as to the evidence admissible in actions on policies which are peculiar to these contracts. It may be useful, however, to state a few of the questions which have passed under adjudication.

If a part-owner is insured, the presumption is that the insurance is on his own separate interest; and the other part-owners have no claim against him for any part of what he recovers, unless on evidence that he insured for them.[2]

It is often important to prove the correctness of foreign records, judgments, or decrees; as a general rule, they must be under seal, and it is not sufficient to prove the handwriting of the officers signing them.[3] The great seal of the country is said to

at the time of the bringing of such action or suit, and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, to make a rule or order staying all proceedings in such action or suit on such terms as to cost and otherwise as to such court or judge may seem fit; Provided always, that any such rule or order may at any time afterwards be discharged, or varied as justice may require." See Russell *v.* Pellegrini, 6 Ellis & B. 1020, 88 Eng. L. & Eq. 99.

[1] Cobb *v.* New England Mut. M. Ins. Co., 6 Gray, 192, 204.

[2] Garrels *v.* Hanna, 5 Harris & J. 412.

[3] Appleton *v.* Braybrook, 2 Stark. 6, 6 M. & S. 34; Black *v.* Braybrook, 2 Stark. 7, 6 M. & S. 39. If the court has no seal, it has been said that the record may be authenticated in another manner. Alves *v.* Bunbury, 4 Camp. 28. In Cavan *v.* Stewart, 1 Stark. 525, a foreign judgment obtained in Jamaica, was attempted to be proved by a certificate of the governor of the island, to which the great seal of the island was appended, that A. was secretary of the island and notary-public, by a certificate of A. as notary-public, that the person who signed the copy of the judgment was the clerk of the court, and by the judgment itself. The copy was not under seal, but it appeared that the court had a seal which was so much worn as to be incapable

prove itself,[1] but to come within this rule, it must be a government which is recognized by the executive and legislative departments of the country where the evidence is sought to be introduced.[2] The seal of an admiralty court is said to prove itself,[3] but the seal of a municipal court must be proved by evidence.[4]

The certificate of a foreign consul would have little or no weight, and indeed, would not, of itself, be admissible in our courts. Nor would the certificate of an American consul be of greater efficacy, unless in cases in which our statutes provide

of making any impression, though it was sometimes used for some purposes, but not for the attestation or exemplification of judgments. Lord *Ellenborough* held, that the proof offered was insufficient.

Although mere words or lines in writing might not constitute a seal, yet "an actual seal stamped upon paper of sufficient tenacity to receive and retain the impression, must be deemed a seal in the technical sense, and within the strict definition of the common law." Ross *v.* Bedell, 5 Duer, 462; Curtis *v.* Leavitt, 17 Barb. 309, 318. In Talcot *v.* Delaware Ins. Co., 2 Wash. C. C. 449, the copy of the record was not sealed, but there was a flourish of the pen on the margin of each page. In the absence of any proof on the point, whether the court had or had not a seal, the court held that this was not sufficient.

[1] Anonymous, 9 Mod. 66; Lincoln *v.* Battelle, 6 Wend. 475. But the certificate in such a case, must be given by a party having charge of the record. Vandervoort *v.* Smith, 2 Caines, 155.

[2] United States *v.* Palmer, 3 Wheat. 610.

[3] Green *v.* Waller, 2 Ld. Raym. 891; Thompson *v.* Stewart, 3 Conn. 171. In this case, the decree of a vice-admiralty court purported to be under the seal of the court and to be certified by the deputy registrar. It was held, that the seal proved itself. In some cases more formal proof has been made, though it does not appear that it was required. See Yeaton *v.* Fry, 5 Cranch, 335, where the copies of the records of the court were certified under the seal of the court by the deputy registrar, and he was certified by the judge of the court, and he in turn by a notary-public. In Gardere *v.* Columbian Ins. Co., 7 Johns. 514, a sentence of condemnation under the seal of the court, signed by the actuary in the absence of the registrar, accompanied with a deposition of a witness proving the seal and signature, was held to be a sufficient authentication. The case of Catlett *v.* Pacific Ins. Co., 1 Paine, C. C. 594, where Mr. Justice *Thompson* held, that the decree of a foreign vice-admiralty court certified by a person as registrar, and a certificate of the American consul that this person was the registrar, were not admissible in evidence. But in this case, the impression of the seal was so effaced as not to be legible, and was not considered as a seal.

[4] De Sobry *v.* De Laistre, 2 Harris & J. 191, 218; Henry *v.* Adey, 3 East, 221, 4 Esp. 228. In Buttrick *v.* Allen, 8 Mass. 273, a copy of the record, under the seal of the court and certified by the clerk, was offered in evidence, together with the affidavit of a person who compared the copy with the record and saw the clerk affix the seal, of these facts, and that the person purporting to be the clerk, was the clerk. This was held to be admissible.

that it may be evidence.[1] And if an instrument is in a foreign language and is properly authenticated, a certificate of the consul that a translation, which he appends is correct, is not admissible.[2]

A survey, as we have seen, is of great value, when duly proved and authenticated by oath; and its absence would be a great disadvantage to parties whose case required, according to usage and practice, that a survey should be made and exhibited; but of itself, it is not legal evidence.[3] If called for by the insurers, and given to them, and they put it into the case for a particular purpose, it seems that the insured may then make use of it.[4]

[1] Catlett *v.* Pacific Ins. Co., 1 Paine, C. C. 594; Church *v.* Hubbart, 2 Cranch, 187; Vandervoort *v.* Smith, 2 Caines, 155. In Waldron *v.* Coombe, 3 Taunt. 162, it was held, that where damaged goods were, by the laws of a foreign country, compelled to be sold under the direction of the consul of the country to which they belonged, the certificate of the consul in respect to the damage, was not admissible.

[2] Church *v.* Hubbart, 2 Cranch, 187.

[3] The survey, being an *ex parte* proceeding, is, of course, not admissible for the insured, and it has been held, that the insurers are not entitled generally to call for it, although the vessel has been condemned and the defence is unseaworthiness. Mitchell *v.* New England Marine Ins. Co., 6 Pick. 117. But in Robinson *v.* Clifford, 2 Wash. C. C. 1, where a vessel was surveyed by order of an admiralty court, and ordered to be condemned as being unfit to prosecute her voyage, the plaintiff, at the trial, to prove the condition of the vessel and that she was reported unfit for the voyage, offered the testimony of the captain. The court held, that the condemnation being a judicial one, parol evidence of the contents of the warrant for a survey and the report of the surveyors was not admissible, and then said: "But the facts contained in the report may, nevertheless, be proved by other testimony in the report." There seems to be some obscurity in the report of this case. And in Abbott *v.* Sebor, 3 Johns. Cas. 39, a survey consequent upon proceeding in an admiralty court, was held to be inadmissible. See also, generally, Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. 249; Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456; Wright *v.* Barnard, 2 Esp. 700.

[4] Saltus *v.* Commercial Ins. Co., 10 Johns. 487. The policy contained the usual rotten clause. At the trial, the plaintiff read a copy of the survey, although it was objected to by the defendant. The case was argued on exceptions, and the court said: "The survey was not evidence on the part of the plaintiffs, unless called for by the defendants. It is altogether an *ex parte* document. But the point need not have been raised in this case, for if the surveys be excluded, there was no evidence of a want of sea-worthiness." In Watson *v.* Ins. Co. of North America, 2 Wash. C. C. 480, the survey and condemnation of the vessel were read by the plaintiff at the trial, without objection on the part of the defendant, for the sole purpose of proving that a survey and condemnation had taken place and not as evidence of the facts stated. It was held, that the plaintiff had not so far put the survey into the case, as to prevent him, on the defendant putting into the case the deposition of one of the surveyors, from introducing evidence to contradict him, and to impeach his veracity.

The same remarks may be made of a log-book.[1] We should say, however, that the insured might, at their own discretion, and their own peril, refuse to exhibit either the survey or the log-book, or both.

The parties may agree that the survey shall be evidence, and even conclusive evidence, as to certain facts. And it seems to be held, that this is the case where the policy contains the not uncommon clause, that "if the vessel shall be declared by a regular survey, unseaworthy by reason of being rotten or unsound or unseaworthy," the insurers shall be discharged. But the effect of this provision seems, perhaps, to be confined to the case where the survey finds, not merely that the vessel is rotten, but that the loss or condemnation of the vessel is caused by such rottenness.[2]

A protest, though a very important document, is not admissible in evidence in chief, but may be used to contradict the testimony of the persons who signed it.[3] The rule is different in some of our States.[4]

[1] The log-book of a party is never admissible in his own favor. The Sociedade Feliz, 1 W. Rob. 303, 311. If it is in the case, it is strong evidence against the party to whom it belongs, if it contains entries against his interest, and is received with suspicion, if it is in his favor. L'Etoile, 2 Dods. 106, 113; The Eleanor, Edw. Adm. 135, 163.

In a suit brought by a vessel, warranted to sail with convoy, against its insurer, the latter was allowed to put in the log-book of the convoying vessel to prove the time of sailing. D'Israeli *v.* Jowett, 1 Esp. 427. And in Watson *v.* King, 4 Camp. 272, the log-book of the convoying vessel and the official letter of the captain at the end of the voyage, were admitted without objection.

[2] See ante, p. 130, 131.

[3] Christian *v.* Coombe, 2 Esp. 489; Senat *v.* Porter, 7 T. R. 158; Scriba *v.* Ins. Co. of North America., 1 Wash. C. C. 408, note; Lamalere *v.* Caze, id. 413; Winthrop *v.* Union Ins. Co., 2 id. 7; Marine Ins. Co. *v.* Stras, 1 Munf. 408; Patterson *v.* Maryland Ins. Co., 3 Harris & J. 71. See also, Ruan *v.* Gardner, 1 Wash. C. C. 145.

[4] In Pennsylvania, in an early case, where an action of covenant was brought by the owners of a vessel against the charterers, a protest was admitted in evidence. Nixon *v.* Long, 1 Dall. 6, 3 Binn. 228, note. It must, however, have been completed within twenty-four hours after the ship's arrival, and it is not sufficient that it was noted in that time, and afterwards completed. Fleming *v.* Marine Ins. Co., 3 Watts & S. 144. In South Carolina, a protest is also admissible in evidence. Campbell *v.* Williamson, 2 Bay, 237. But it may be discredited by evidence of inconsistent declarations on the part of those who signed it. Church *v.* Teasdale, 1 Brev. 255.

BOOK III.

ON THE LAW AND JURISDICTION OF ADMIRALTY.

A TREATISE

ON THE

LAW OF MARITIME PROPERTY AND CONTRACTS.

BOOK III.

ON THE LAW AND JURISDICTION OF ADMIRALTY.

INTRODUCTORY.

In treating of the Law of Admiralty, we necessarily encounter some topics which have already received more or less consideration in the chapters on Shipping, and those on Insurance. This is especially true of questions of prize, of blockade, of neutrality, of contraband, and generally of all those which grow out of a state of war. When these questions present themselves directly, they are, for the most part, within the exclusive jurisdiction of admiralty. And the same thing is true of salvage and collision and some other topics. But all these questions come before other courts in a collateral and incidental way; as in cases of Insurance, and in others involving the law of Shipping. Then, these other courts generally look to courts of admiralty for the determination of the law; and accepting the law thus ascertained, they confine themselves to applying it to the cases before them. For this reason, it has been necessary to present these rules of Admiralty Law in those chapters on the Law of Ship-

ping, and on Insurance, which relate to them. But we do not on that account, omit them wholly here; we retain them, however, only so far as is necessary to exhibit a systematic view of this subject. And we now present in reference to them, whatever views would seem to be suggested by their relation to the law of admiralty.

CHAPTER I.

THE EXTENT OF THE JURISDICTION OF ADMIRALTY.

SECTION I.

THE EXTENT AS DETERMINED BY PLACE.

THE jurisdiction of the court of admiralty in England, is undoubtedly, aside from the jurisdiction conferred by recent statutes, confined to places outside the body of a county, and within the ebb and flow of the tide; being permanent where the tide always flows, and existing in any place between high and low-water mark when the tide covers that place, and ceasing to exist there when the tide leaves that place.[1] The admiralty powers

[1] 1 Blacks. Comm. 110; 4 id. 268; Constable's Case, 5 Coke, 106, 107; Barber *v.* Wharton, 2 Ld. Raym. 1452; 2 East, P. C. 803. See also 1 Kent, Comm. 366. But even if the *locus* be on the water and on a place where the tide never leaves the shore bare, admiralty is excluded of jurisdiction, if it be within the body of any county. This is by virtue of the statutes of 13 Rich. II. ch. 5, and 15 Rich. II. ch. 3, which were passed with a view of restraining the jurisdiction of the courts of admiralty. One of the reasons why these courts were obnoxious was, that they did not have a trial by jury, but followed the forms and were governed by the rules of the civil law, which was dreaded and detested by the English people; perhaps, because it was introduced by the clergy and used by them for their own aggrandizement. The civil law was especially fitted for the municipal form of government, but was antagonistic to the feudal system. See Pritchard's Digest, Preface; Wynne's Life of Sir L. Jenkins, p. 78; Thierry, Conquête de l'Angleterre, Vol. IV. p. 334–339; Browne, Civ. & Adm. Law, Vol. II. p. 91.

There has been great contention in regard to the construction of the statutes of Rich. II. Anciently the judges depended upon the fees of their courts for their emoluments, and the common law courts, having the highest power, put such a construction on the statutes as very much abridged the rightful power of the admiralty; but the admiralty lawyers never acquiesced in this usurpation, and have recorded their protests against the deprivation of their authority. As the King's Bench has the controlling power, their decisions must be taken as the law of England, and they have held that the "bodies of counties" from which admiralty jurisdiction is excluded, comprehend all

of the courts of this country are given by statutes in conformity with the constitution; and must be defined and measured

"navigable rivers, creeks, ports, harbors, and arms of the sea which are so narrow as to permit a person to discern, and attest upon oath, any thing done on the other shore, and so as to enable an inquisition of the facts to be taken." Rex *v.* Soleguard, Andr. 231; 2 Browne, Civ. & Adm. Law, 92; Stanton, J., Fitz. Herb. Abr. Corone, 399, 8 Edw. II.; 4 Inst. 140; Hawkins, P. C. p. 2, ch. 9, § 14; 2 East, P. C. 804; United States *v.* Wiltberger, 5 Wheat. 106, note; Com. Dig. Tit. Adm. E. 7, 14; Bacon, Abr. Tit. Adm. A. See also, United States *v.* Grush, 5 Mason, 290; and United States *v.* Robinson, 4 Mason, 307. Yet admiralty has always claimed jurisdiction on tide waters up to the first bridges, and rightfully too, according to the opinions of ten of the judges in 1713, cited in Andr. 232; 1 Kent, 366; De Lovio *v.* Boit, 2 Gallis. 398, 420; 15 Rich. II. ch. 3. But prohibition lies if it be within a port, 4 Inst. 138, 141; Violet *v.* Blague, Cro. Jac. 514; 1 Com. Dig. 506. For a general discussion of this question in relation to prize, see Ex parte Lynch, 1 Madd. 15; and note to The Amiable Nancy, 3 Wheat. 546, 558. In 1812, all the judges agreed that common law and admiralty had concurrent jurisdiction in bays, havens, creeks, etc. where ships of war floated. 2 Leach's Crown Cases, 1093.

Much of this struggle arose in the time of Lord Coke. The insufficiency of his authorities and the reasons for his prohibitions have been amply shown by Godolphin, Exton, Jenkins, and others, and the whole learning now of any value is collected in the case of De Lovio *v.* Boit, 2 Gallis. 398. The practical value of this question is destroyed in England, by acts of parliament declaring the jurisdiction of the high courts of admiralty. The following books and cases generally accessible to American students contain elaborate discussions of the subject. De Lovio *v.* Boit, 2 Gallis. 398; 1 Kent, Lect. XVII.; The Schooner Tilton, 5 Mason, 465; Bains *v.* Schooner James, Bald. C. C. 544; Ramsay *v.* Allegre, 12 Wheat. 611; The Huntress, Daveis, 93, note.

In The Eleanor, 6 Rob. Adm. 39; The Public Opinion, 2 Hagg. Adm. 398; and The Eliza Jane, 3 Hagg. Adm. 335; the court of admiralty refused jurisdiction, because the cause of action had arisen within the body of a county. But by 3 & 4 Vict. c. 65, § 6, it is enacted that the high court of admiralty shall have jurisdiction to decide all claims of salvage, damage, or towage, relating to any ship or sea-going vessel, and for necessaries supplied, etc., whether such ship was within the body of a county or on the high seas at the time when the cause of action accrued. And by 9 and 10 Vict. c. 99, § 40, said court has jurisdiction to decide all claims whatever, in the nature of salvage, to articles found at sea or on shore, and whether the services have been performed at sea or within the body of a county. By the 3 and 4 Vict. c. 65, questions of title and of mortgage, claims to proceeds in the registry, may be decided in said court, witnesses may be examined by word of mouth, and their attendance compelled.

In The Alexander, 1 W. Rob. 288, it is held that it was not necessary that the claim should have arisen since the passage of the statute in order to give the court jurisdiction.

In The Fortitude, 2 W. Rob. 217, it is held that the enabling power given to the court by the 3 and 4 Vict. c. 65, § 3, 4, does not extend to *all* questions arising out of a mortgage (as mortgagee's right to freight), but is confined to the ship itself being mortgaged. In the case of A Raft of Timber, 2 W. Rob. 251, under the 3 and 4 Vict. c. 65, § 6; the court refused to entertain a suit for salvage of a raft of timber, on the ground that it was neither a ship nor a sea-going vessel. But the 9 and 10 Vict.

by those statutes, which, in their turn, are in force if within the requirement and purview of the constitution, and void if they exceed or violate the constitution.[1] The first question, therefore, is, does the word admiralty mean, or necessarily imply in our constitution or in this country, what it undoubtedly meant in England, and therefore as it may be fairly argued, in these States when they were colonies of Great Britain. It seems probable that no question of this kind, in regard to the jurisdiction of admiralty as affected by place, suggested itself to the framers of the constitution; nor did any case come before the courts for some years; and when it did come, it appears to have been scarcely considered as an open question.

In 1825, the Supreme Court of the United States held that the admiralty jurisdiction was strictly confined to the "sea or waters within the ebb and flow of the tide;" and they consider, only to dismiss, the question whether congress might not extend this jurisdiction to voyages on our western waters, under the "power to regulate commerce among the States."[2] In 1833, it was decided that the court had jurisdiction in a case where supplies were furnished at the port of New Orleans, the court taking judicial notice of the fact that the tide ebbed and flowed at that place, and considered it to ebb and flow although it was not strong enough to turn the current of the river backward,

c. 99, § 40, above quoted, would now give the court jurisdiction. In The Flecha, 1 Spink, Adm. 438, where a steam vessel which plied regularly between Ghent and London was supplied with a new propeller, it was objected that as the vessel could have made her voyage in safety with her old propeller, the new one was not "a necessary" within the statutes, and consequently the court had no jurisdiction. But *Dr. Lushington* said: "I cannot accede to that proposition, for I think there is a necessity to make such vessels perfect and sea-worthy in all respects. The opinion of the court will always be that these vessels, to which the lives of passengers are intrusted, should be constantly kept in that state of repair which most conduces to their safety."

[1] The Constitution of the United States, Art. 3, § 2, provides that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction." And the Judiciary Act of Sept. 24, 1789, ch. 20, § 9, provides that the district courts shall have "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it," etc. 1 U. S. Stats. at Large, 76.

[2] The Thomas Jefferson, 10 Wheat. 428.

but merely to occasion a regular rise and fall of the water.[1] In 1837, the same court approved the law of the former cases, and it was held that the voyage must be substantially maritime, and did not come within this jurisdiction, because one terminus was at New Orleans within the tide, the voyage being on the river Mississippi, between New Orleans and other ports hundreds of miles above the rise and fall of the tide.[2] In 1848, before the same court, this question was again raised, but not disposed of, because the collision, which was the foundation of the case, occurred on a place in the Mississippi, where it was finally decided that the river rose and fell with the tide, and the important point was determined that the court had jurisdiction, although the collision occurred on a river within a county of the State of Louisiana.[3]

In February, 1845, an act of congress was passed extending the admiralty jurisdiction of the district court to vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in commerce between ports in different States and Territories upon the lakes and the navigable waters connecting the same.[4] And in 1851 a case was decided by the Supreme Court of the United States, in which the principal question was, whether this statute was constitutional, or unconstitutional and void. And the court decided that it was constitutional, not under the clause permitting congress to regulate commerce among the States, but on far wider grounds.[5] It is indeed maintained by the court in this case, that the limitation of tide waters has no force or applicability in this country; that it was reasonable and useful in England, where there is no important navigation above the flow of tide; but

[1] Peyroux *v.* Howard, 7 Pet. 324.

[2] The Steamboat Orleans *v.* Phœbus, 11 Pet. 175.

[3] Waring *v.* Clarke, 5 How. 441. *Catron*, J., *Woodbury*, J., *Daniel*, J., and *Grier*, J., dissented. And in Jackson *v.* Steamboat Magnolia, 20 How. 296, this decision was reaffirmed, Mr. Justice *Grier*, delivering the opinion of the court. *Catron*, J., *Daniel*, J., and *Campbell*, J., dissented.

[4] Act of 1845, ch. 20, 5 U. S. Stats. at Large, 726. This act reserves to the parties the right of trial by jury of all facts put in issue, where either party requires it, and saves the right of a concurrent remedy at common law.

[5] The Genesee Chief *v.* Fitzhugh, 12 How. 443. See also, New Jersey Steam Navigation Co. *v.* Merchant's Bank, 6 How. 344; Waring *v.* Clarke, 5 How. 441; and United States *v.* La Vengeance, 3 Dall. 297.

that originally and by its nature, the admiralty jurisdiction extended over all public waters, or over all navigable waters which were used for the transport of commerce; that the English limitation answered very well for this country at its beginning, the old thirteen States having little or no navigation above the ebb and flow of the tide; but that circumstances were greatly changed; that we now border upon inland seas, and our magnificent western rivers are covered with an extensive and valuable commerce, and that the admiralty jurisdiction of this country, by force of the American meaning of the word, or that meaning which the peculiar circumstances of this country make necessary, extends over all our navigable waters, whether lake or river, and however far removed from the presence or influence of the tide. This question was ably and fully argued. The court were nearly unanimous in their opinion; and maintained it by a reasoning which is founded upon certain and pertinent facts, and which has in itself a force which we deem inevitable. We consider it, therefore, finally settled, both by the weight of the authority, and by the conclusiveness of the argument, that by the law of this country, the admiralty jurisdiction extends over all navigable waters, without respect to the tide.[1]

[1] In cases of tort, the admiralty jurisdiction always depended, of course, upon locality, for there was nothing else to guide it. But the trials in the admiralty courts being without a jury, the English government, as has been said, were willing to prevent any usurpation of authority by the admiralty courts, and therefore the statutes of 13th and 15th Rich. II. were passed. The admiralty always contended that these statutes were only intended to prevent their meddling with things relating to the land, and were not intended to abridge their real jurisdiction, particularly as the 13 Rich. II. refers particularly to their jurisdiction in the time of King Edward III., and confirmed the same. See De Lovio *v.* Boit, 2 Gallis. 398, 420.

But it was the aim of Lord *Coke*, in those efforts of his to which we have already referred, to make locality the boundary in cases of contract; a thing which had not been attempted before his time. The unreasonableness and inconvenience of this rule, compelled the common law courts to relax it in cases of seaman's wages, and then they began to reflect upon what jurisdiction in admiralty rested; and all have since acknowledged that in cases of *contract*, the *subject-matter*, and not the locality, determined the jurisdiction. Menetone *v.* Gibbons, 3 T. R. 267, is the leading case upon this subject. See also, Waring *v.* Clarke, 5 How. 441, 459.

But the courts of this country have never paid much attention to the English interpretations of admiralty jurisdiction. The colonies had each an admiralty court with powers equal to the largest claimed by the admiralty, even under Edward III. The States delegated to the federal government, their separate "admiralty and maritime jurisdiction," using these words in their largest sense; which was the sense in which

It is true that an advantage is lost by the abandonment of the old limitation; and it is the advantage of a line of distinction which was well defined and easily ascertainable. Whether a particular location is within the definition of "navigable waters," may often be a question of some difficulty. But this question must depend in each case upon the peculiar facts thereof.[1] Under the statute of 1845, the district court has no jurisdiction over a contract of affreightment for the carriage of goods between two ports of the same State, though in a general ship whose principal voyage is between ports of different States.[2]

they are understood in every country in Europe, England excepted, and the sense in which they had been used here for a long time. And, without a word being said as to the very narrow jurisdiction of the English court in any of the debates or treatises contemporary with the formation of the constitution, the decisions of the courts immediately after the formation of our present government, put a construction on the grants incompatible with the English rule. Waring *v.* Clarke, 5 How. 441; New Jersey Steam Nav. Co. *v.* Merchant's Bank, 6 How. 344; The Huntress, Daveis, 93, note. And now, by the decision in the case of The Genesee Chief *v.* Fitzhugh, 12 How. 443, the navigable lakes and rivers of the United States are considered similar in some respects to the sea. The arguments against this jurisdiction of the admiralty courts, have simply asserted that admiralty meant here just what it did in England at the time of our Revolution, and that the common law is our only guide in interpreting our constitution. *Woodbury*, J., in his dissenting opinion in Waring *v.* Clarke, 5 How. 441; and *Johnson*, J., in Ramsay *v.* Allegre, 12 Wheat. 611; have stated the whole argument, with all the authority, in favor of the limited jurisdiction.

[1] In Jackson *v.* Steamboat Magnolia, 20 How. 296, it was held that the court had jurisdiction in case of a collision which occurred on the Alabama River two hundred miles above tide waters. And it was distinctly declared that the admiralty jurisdiction exercised over the great navigable rivers of the West was not by virtue of the Act of 1845, but under the Judiciary Act, which declared the jurisdiction to extend to all waters *which are navigable from the sea*, by vessels of ten or more tons burden. See also, Fretz *v.* Bull, 12 How. 466. In Williams *v.* The Barge Jenny Lind, 1 Newb. Adm. 443, and in the case of Eads *v.* The Steamboat H. D. Bacon, 1 Newb. Adm. 274, claims for salvage compensation on the Mississippi were enforced; and in McGinnis *v.* The Pontiac, 1 Newb. Adm. 130, one for salvage on the Ohio, was entertained. Under the Act of 1845, it has been held that the court has not jurisdiction of a claim for wages for services rendered on a canal boat on the Erie Canal, between New York and Buffalo, on the ground that the canal did not connect navigable lakes. McCormick *v.* Ives, Abbott, Adm. 418. But the Welland Canal, which connects Lake Erie with Lake Ontario, has been declared to be a navigable water within the meaning of the statute. Scott *v.* The Young America, 1 Newb. Adm. 101.

[2] Allen *v.* Newberry, U. S. Supreme Court, Dec. T. 1858, 7 Am. Law Register, 436. It was also suggested, though not decided, that in such a case, where the vessel had cargo on board to be carried between ports of the same State, as well as between ports of different States, in cases of sale or bottomry of the cargo for relief of the vessel in distress, of voluntary stranding of the ship, jettison, and the like, the court would

There appears to be some misconception as to the effect of the decision of the supreme court upholding the constitutionality of the Act of 1845. It is said that if the statute is constitutional on the ground "that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction, as known and understood in the United States when the constitution was adopted, ... it is a serious question whether the Act of 1845 is not superseded and rendered nugatory by the decision of the supreme court."[1] But this, we think, is a conclusion which is by no means warranted from the premises. It is true that the provision of the constitution of the United States is broad enough, according to the decision of the supreme court, to cover the lakes as well as rivers navigable from the sea. But the Act of 1789, only conferred jurisdiction over cases arising on rivers navigable from the sea. The Act of 1845, was therefore necessary to enable the courts to act on cases arising on the lakes and navigable waters connecting the same. And we think it is clear that in cases under the Act of 1845, the courts must proceed in accordance with its provisions.

deal incidentally with the subject. The precise meaning of the language used by the court is doubtful, and it is not very apparent whether they mean that in the cases mentioned, the court would exercise jurisdiction over the cargo shipped from one port to another in the same State, by itself, or whether they mean that having jurisdiction over the cargo shipped to a different State they would, in order to make a proper decree, take jurisdiction also over the other cargo.

[1] This is the language of Mr. Justice *Conkling*, in his treatise on Admiralty Jurisdiction, Vol. 1, 2d ed. p. 17. And Mr. Justice *Wilkins*, in the district of Michigan, in enforcing a claim for wages on a voyage between Detroit and Buffalo, took occasion to say that "the jurisdiction of this court, in cases of admiralty, does not rest upon the statute of 1845, but upon the constitution of the United States," etc. Franconet *v.* The Propeller Backus, 1 Newb. Adm. 1. This decision was given in 1852, but in 1856, the same judge stated the law more accurately. He said: "This court derives its jurisdiction from the constitution of the United States, and the acts of congress made in pursuance thereof. The Act of 1845 did not enlarge the jurisdiction of the national courts as to questions of admiralty, but merely conferred a new jurisdiction on the district court." Scott *v.* The Young America, 1 Newb. Adm. 101. In a case decided in the Northern District of Ohio in 1856, Mr. Justice *Willson* ruled that the decision in the case of The Propeller Genesee Chief *v.* Fitzhugh, "placed the admiralty jurisdiction of the lakes upon the same basis as that of the tide and salt waters." And that "independent of the Act of 1845, the maritime law has the same application to cases on the lakes as it has to those upon tide water, not only in matters of jurisdiction, but also in forms of procedure and practice." Parmlee *v.* The Propeller Charles Mears, 1 Newb. Adm. 197. See also, Wolverton *v.* Lacey, in the same court, 18 Law Reporter, 672.

Mixed cases often come before the admiralty courts, in which the services are rendered, or the claims arise, partly on land and partly at sea.[1] As if goods are on shore when embezzled, or salvage services are continued after the cargo is landed; and in such cases admiralty takes jurisdiction if the services or claims are principally or substantially maritime; the word maritime, here, of course, now referring to the lakes and navigable waters connecting the same, as well as to the ocean and tide rivers.

Liens, similar to those in admiralty, may be given by local law in reference to places, or subjects or contracts not properly within admiralty jurisdiction; and, until we are compelled to hold the contrary, by authoritative and decisive adjudication, we shall hold, that the courts of admiralty will enforce these so far

[1] In United States *v.* Coombs, 12 Pet. 72, 76, the court said, that "Mixed cases may arise, and often do arise, where the acts and services done are of a mixed nature; as, where salvage services are performed partly on tide waters and partly on the shore, for the preservation of the property saved; in which the admiralty jurisdiction has been constantly exercised to the extent of decreeing salvage. That this is a rightful exercise of jurisdiction by our courts of admiralty, was assumed as the basis of much of the reasoning of this court in American Ins. Co. *v.* Canter, 1 Pet. 511. It has also been asserted and enforced by Lord *Stowell*, on various occasions; and especially in The Augusta or Eugenie, 1 Hagg. Adm. 16; The Jonge Nicholaas, 1 Hagg. Adm. 201; The Rainger, 2 Hagg. Adm. 42; The Happy Return, 2 Hagg. Adm. 198. See also, The Henry of Philadelphia, 1 Hagg. Adm. 264; The Vesta, 2 Hagg. Adm. 189; The Salacia, 2 Hagg. Adm. 262." — We hold this doctrine to be law. But some of the authorities cited are very far from proving that Lord Stowell asserted and enforced the above doctrine. The Augusta or Eugenie, 1 Hagg. Adm. 16, which is the principal case relied upon, was entertained principally, if not solely, on the ground that the subject-matter was a perquisite of the crown. The 100*l.* given to the suer was *not salvage*. The Jonge Nicholaas, 1 Hagg. Adm. 201, simply decided, what expenses of preserving the cargo were chargeable on that part of the cargo which was to be sold duty free, under the statute. The Rainger, 2 Hagg. Adm. 42, does not seem to confirm the doctrine. The others are simply salvage cases. The law as thus stated, appears to have been held in courts of common law; for it has been laid down, that if the libel is founded on one single continual act which was principally upon the sea, though a part was on the land, as, if the mast of a ship be taken upon the sea, though it be afterwards brought ashore, no prohibition lies. Com. Dig. Adm. F. 5; 1 Rolle, Abr. 533, l. 13; which are but one citation. Mr. Justice *Story* also cites, in 12 Pet. 77, Com. Dig. Adm. E. 12; but, not accurately. Nothing under E. gives any support to this view. The doctrine laid down may be better supported by the following authorities. "The court of admiralty has jurisdiction of a ship taken on the sea, being stranded or damaged in the haven." This evidently means salvage cases. Com. Dig. Adm. F. 6; Turner *v.* Smith, 1 Sid. 367; Turner *v.* Neele, 1 Lev. 243. And, "when admiralty has cognizance of the principal cause, it shall have jurisdiction over the incidents." Radley *v.* Egglesfield, 2 Saund. 260, 1 Vent. 173, 174, 2 Lev. 25; Anonymous, 1 Vent. 308; Anonymous, Cro. Eliz. 685; Com. Dig. Adm. F. 6; Tremoulin *v.* Sands (9 W. 3), Comb. 462, 463; 6 Viner's Abr. 516.

as they appertain to maritime matters; as the liens of material-men on a ship in a home port; but they will not enlarge their jurisdiction to enforce the local laws over matters not cognizable in admiralty.[1] We cannot doubt that our district courts would enforce by their admiralty process, a lien on a ship given by a foreign government or law, when that ship was in a port within the jurisdiction of the court. Why should the statutes of our own States, and especially of a State in which the court is sitting have less power, or be entitled to less regard?[2] We shall recur to this topic again.

In cases of prize, however, the admiralty jurisdiction appears to depend wholly on the subject-matter without a controlling reference to place; and captures by land, if by any coöperation with a naval force, are within the jurisdiction. In our note we shall endeavor to exhibit the present condition of the adjudication on this subject.[3]

[1] We have already anticipated this question to some extent, in our first volume, p. 501, n. 2; and only add here a case which was decided soon after that portion of our work was in press, together with a new rule of the Supreme Court of the United States. The case referred to is The Richard Busteed, U. S. D. C., Mass., Oct. 1858, 21 Law Reporter, 601, in which it was decided that a lien given by a statute of Massachusetts for labor in building a vessel, could be enforced in admiralty. The case of The People's Ferry Company *v.* Beers, 20 How. 393, was reviewed at length, and the learned judge came to the conclusion that the contract for building a vessel is a maritime contract, and if a lien is given by a State court it will be enforced in admiralty. The 12th admiralty rule of the supreme court, referred to in Vol. 1, p. 501, n. 2, has also been repealed, and a new one substituted, which went into operation on the 1st day of May, 1859. This makes the same provision as the former rule in respect to foreign ships, and then provides that "the like proceeding *in personam* but not *in rem* shall apply to cases of domestic ships for supplies, repairs, or other necessaries." See also, post, ch. 8.

[2] See the case of The Bark Havana, U. S. D. C., Mass., 22 Law Reporter, 150. In this case the court enforced the lien given to a master for his wages by the English statute of 17 and 18 Vict. c. 104. The vessel was owned in St. Johns, New Brunswick. The case was decided on the ground that the statute gave not only a remedy, but also a right, and that the lien should be enforced wherever the *thing* could be found.

[3] It may now be considered settled law, that the courts of the United States, under the Judiciary Act of 1789, ch. 20, 1 U. S. Stats. at Large, 73, have, by the delegation of all civil causes of admiralty and maritime jurisdiction, at least as full jurisdiction of all causes of prize as the admiralty in England. The Cargo of the Ship Emulous, 1 Gallis. 563, 573. See also, Glass *v.* The Sloop Betsey, 3 Dall. 6; 1 Kent, Comm. 355, 356. The case of Lindo *v.* Rodney, 2 Doug. 613, note, fixed the jurisdiction of the High Court of Admiralty in England in cases of prize. It was there said, that on the breaking out of a war, a special commission issues to the Lord High Admiral, to require the court of admiralty to take jurisdiction in prize causes. But see Ex parte

SECTION II.

THE EXTENT OF ADMIRALTY JURISDICTION AS DETERMINED BY THE SUBJECT-MATTER OF THE ACTION.

The history of this question, both in England and in this country, is very interesting. It is not easy to define with much precision the jurisdiction of these courts under the earlier Norman kings; but there is, perhaps, sufficient authority for saying, that, for some centuries before Richard II., it extended to all maritime contracts, and all offences on the high seas or tide waters.[1] But these courts had no juries; and were in this

Lynch, 1 Madd. 15, cited in 3 Wheat. 558, note. Questions of prize or no prize, or by whom taken, must be decided by the judge of the high court of admiralty, and cannot be tried at common law. Mitchell *v.* Rodney (in error), 2 Bro. P. C. 423. See also, Faith *v.* Pearson, 2 Marsh. 133, 6 Taunt. 439, 4 Camp. 357, Holt, 113; Pritchard's Dig. Prize, 17–35. When a capture is made at land by the assistance of a fleet, all questions concerning the property captured belong exclusively to the jurisdiction of the high court of admiralty. Lindo *v.* Rodney, 2 Doug. 613, n.

All title to sea prize must be derived from commissions under the admiralty, which is the great fountain of maritime authority, and a military force on land is not invested with any commission so derived. A capture, therefore, at sea, made by such a force on land, enures to the benefit of the lord high admiral. The Rebeckah, 1 Rob. Adm. 227, 235.

All questions of prize are to be decided by the court of admiralty, and by no other. Therefore, in Glass *v.* The Sloop Betsey, 3 Dall. 6, it was held that the district court could take cognizance of a suit brought by the captured ship, against her captors, who were foreigners (French), and had sent their prize into Baltimore, to be adjudicated upon by the French consul. The court also held that the jurisdiction over French prizes heretofore held by French consuls in this country, was not of right.

[1] In De Lovio *v.* Boit, 2 Gallis. 398, 406, Mr. Justice Story, after a comprehensive review of all the authorities, states the following to be his conclusions. "At all events, it cannot be denied on these authorities, that before and in the reign of Edward III., the admiralty exercised jurisdiction, 1st, over matters of prize and its incidents; 2d, over torts, injuries, and offences, in ports within the ebb and flow of the tide, on the British seas and on the high seas; 3d, over contracts and other matters regulated and provided for by the laws of Oleron and other special ordinances, and 4th (as the commission of Robert de Herle shows), over maritime causes in general." This view of the admiralty jurisdiction in the reign of Edward III., is admitted to be correct. See 1 Kent, Comm. 368. See also the opinion of *Johnson*, J., dissenting, in Ramsay *v.* Allegre, 12 Wheat. 611. In fact, all the ancient learning is, as we have intimated, collected in De Lovio *v.* Boit, and, whatever may be the difference of opinion as to its general doctrine, or as to the particular point which it decides, there is no dispute as to

respect strongly opposed both to the popular will and the principles of English jurisprudence. The judges and officers of all the courts of England then depended for their support and emolument mainly on their fees and perquisites; and these again upon the extent of their business. They were, therefore, in some measure, rivals of each other. We have already considered this subject somewhat, in treating of admiralty jurisdiction, as determined by place. The conflict in relation to the questions of jurisdiction, as affected by the subject-matter in controversy, was still more urgent. And the endeavors of the common law and equity courts to restrict the courts of admiralty, or in other words to exclude from that court and draw to themselves a portion of its business, were eminently successful. In its administration of justice, the admiralty court conformed in no respect to the common law, and did not acknowledge the authority of any of its rules. It governed itself wholly by maritime usages and customs, and by the ancient laws of the seas, and the forms and procedures of other maritime courts of Europe. All this opened it to attack, and after a considerable struggle, certain statutes were passed in the reign of Richard II., which were certainly intended to lessen the jurisdiction of admiralty very much, and which did lessen it in fact, and by the construction of the common law courts, far more perhaps than was intended. The admiralty courts did not consent to this construction; but, nevertheless, their jurisdiction was gradually abridged, until, at the adoption of our constitution, it embraced, in fact, very much less than its original or early extent. The question then arose in this country what was meant by the words "admiralty" and "maritime jurisdiction?" Did they mean that jurisdiction as it originally existed in England; or as it existed when our constitution was formed; or as it stood at any intermediate period? We are indebted for the true answer to the firmness and intelligence of the judges who administered the law of admiralty at the time these questions came up for adjudication, and we may be permitted to refer more specifically to Chief Justice Marshall and his associates Mr. Justice Story and

its general accuracy. The cases cited by Lord Coke to disprove this jurisdiction, are shown to "fail of their intended purpose, and leave the current of authority flowing with an uniform and irresistible force in its favor."

Mr. Justice Washington. After a conflict of some duration, we may consider it as settled, not perhaps that our admiralty jurisdiction is coequal with that of the original English or that of the continental European admiralty, but rather that defined by the statutes of Richard II. under the construction given to them by the contemporary or immediately subsequent courts of admiralty. In general, and as a definition, there seems to be no other rule than that our admiralty jurisdiction embraces all maritime contracts, torts, injuries or offences.[1]

[1] The admiralty jurisdiction in this country as to the subjects to which it attaches, may fairly be said to have for its basis, the jurisdiction of such courts in the time of Edward III.; and the decisions of our own courts on the subject, have so fully expounded and discussed the maritime law, that we need not go beyond our own reports, to find most of the law. Little attention has been paid to those decisions of the English common law courts, which confined, within limits unreasonably narrow, the jurisdiction of the high court of admiralty. Not bound by precedents, except so far as they were consistent with reason, our courts took their powers from the constitution and congress, and the admiralty jurisdiction was restored to its original rightful and convenient limits, from which it had never been driven, except by the jealousy of the common-law lawyers, and which it has always kept in all other countries. The attempts of Lord Coke to apply the statutes of Rich. II. to contracts, and which, if successful and consistent in themselves, would have deprived the admiralty of cognizance even of seamen's wages, and bottomry bonds, were successful but a short time, and now, by acts of parliament, much of the original jurisdiction has been restored. Of the many cases which might be cited on this point, perhaps De Lovio *v.* Boit, 2 Gallis. 398, and Waring *v.* Clarke, 5 How. 441, may be considered as the most instructive.

As to the restrictive statutes of Rich. II., we quote the following remarks from De Lovio *v.* Boit, 2 Gallis. 398, 420. "In the construction of these statutes, the admiralty has uniformly and without hesitation maintained, that they were never intended to abridge or restrain the rightful jurisdiction of that court; that they were meant to take away any pretence of entertaining suits upon contracts arising wholly upon land, and referring solely to terrene affairs, and upon torts or injuries, which, though arising in ports, were not done within the ebb and flow of the tide; and that the language of those statutes, as well as the manifest object thereof, as stated in the preambles and in the petitions on which they were founded, is fully satisfied by this exposition. So that, consistently with these statutes, the admiralty may still exercise jurisdiction, 1, over torts and injuries upon the high seas, and in ports within the ebb and flow of the tide, and in great streams below the first bridges; 2, over all maritime contracts, arising at home or abroad; 3, over matters of prize and its incidents. On the other hand, the courts of common law have held that the jurisdiction of the admiralty is confined to contracts and things *exclusively* made and done upon the high seas, and to be executed upon the high seas; that it has no jurisdiction over torts, offences, or injuries done in port, within the bodies of counties, notwithstanding the places be within the ebb and flow of the tide; nor over maritime contracts made within the bodies of counties or beyond sea, although they are in some measure to be executed upon the high seas; nor of contracts made upon the high seas to be executed upon land, or touching things not in

But the question still remains, what contracts or what torts are maritime. We may say that within this term are certainly included salvage;[1] bonds of bottomry, respondentia or hypothecation of ship and cargo;[2] seamen's wages;[3] seizures under the laws of impost, navigation, or trade;[4] and cases or questions of prize or ransom.[5] Nor should we hesitate to place with almost equal certainty, with these, all charter-parties[6] and contracts of

their own nature maritime, such as a contract for payment of money; nor of any contracts, which, though maritime and made at sea, are under seal and contain unusual stipulations." It is plain that all the above interpretation is not now, nor has for a long time, been accepted. The attempt to transfer the test of locality to contracts was met in Menetone *v.* Gibbons, 3 T. R. 267, 269, where it is expressly laid down that, in cases of contracts, the subject-matter governs the admiralty jurisdiction. See Waring *v.* Clarke, 5 How. 441, 459; and ante, p. 501, n. 1 Among the most important cases in which the admiralty jurisdiction of this country has been considered, besides those already cited in this note, are The Huntress, Daveis, 93; Peele *v.* Merchants' Ins. Co. 3 Mason, 28; Read *v.* The Hull of a New Brig, 1 Story, 244; Hale *v.* Washington Ins. Co., 2 Story, 176; Ramsay *v.* Allegre, 12 Wheat. 611; United States *v.* Sch. Sally, 2 Cranch, 406; United States *v.* Sch. Betsey, 4 Cranch, 444; New Jersey Steam Navigation Co. *v.* Merchants' Bank, 6 How. 344; United States *v.* La Vengeance, 3 Dall. 297; Minturn *v.* Maynard, 17 How. 477; Bogart *v.* Steamboat John Jay, 17 How. 399; Ward *v.* Peck, 18 How. 267; Schuchardt *v.* Ship Angelique, 19 How. 239; Vandewater *v.* Mills, 19 How. 82; Taylor *v.* Carryl, 20 How. 583; Jackson *v.* Steamboat Magnolia, 20 How. 296.

[1] United States *v.* Coombs, 12 Pet. 72; American Ins. Co. *v.* 356 Bales of Cotton, 1 Pet. 511. The admiralty jurisdiction is asserted in salvage questions between foreigners, in Mason *v.* The Blaireau, 2 Cranch, 240.

[2] The Aurora, 1 Wheat. 96; Blaine *v.* Ship Charles Carter, 4 Cranch, 328; The Virgin, 8 Pet. 538; The Fortitude, 3 Sumner, 228; The Brig Ann C. Pratt, 1 Curtis, C. C. 340; Affirmed, Carrington *v.* Pratt, 18 How. 63. See also Menetone *v.* Gibbons, 3 T. R. 267.

[3] See cases cited ante, Vol. I. p. 441–478.

[4] Act of 1789, ch. 20, § 9, 1 U. S. Stats. at Large, 76.

[5] Glass *v.* Sloop Betsey, 3 Dall. 6. In this case the commander of a French privateer captured a vessel on the high seas and sent her into Baltimore to be adjudicated upon by the French consul, as was then to some extent the practice. The owners of the vessel and cargo filed a libel in the District Court of the United States, claiming restitution on the ground that the vessel belonged to subjects of the king of Sweden, and that the cargo was owned jointly by Americans and Swedes. A plea to the jurisdiction was filed, but it was overruled, and the court was also of the opinion that no foreign power could of right "institute or erect any court of judicature of any kind, within the jurisdiction of the United States, but such only as may be warranted by, and be in pursuance of treaties."

[6] The Sch. Volunteer, 1 Sumner, 551; Certain Logs of Mahogany, 2 id. 589; Arthur *v.* Sch. Cassius, 2 Story, 81; Drinkwater *v.* Brig Spartan, Ware, 149. It has been held, however, that an action *in rem* will not lie for the misrepresentation or concealment of facts by her master or owner in respect to the tonnage or capacity of a vessel. The Eli Whitney, 1 Blatchf. C. C. 360.

affreightments,[1] on voyages made between different States; but the act of 1845, relating to the lakes and navigable waters connecting the same, gives no jurisdiction over the domestic commerce of a State, that is, over contracts for carrying goods between ports and places in the same state.[2] There is, however, a general admiralty jurisdiction over a contract for the conveyance of a passenger in a vessel, aside from this statute,[3] and we pre-

[1] New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344; Rich *v.* Lambert, 12 id. 347; The Sch. Reeside, 2 Sumner, 567; The Rebecca, Ware, 188; The Phebe, id. 263; The Paragon, id. 322. In New Jersey Steam Nav. Co. *v.* Merchants' Bank, *supra*, a libel *in personam* for breach of a contract of affreightment between the cities of Providence and New York, was maintained. On page 392, the court disposed of the objection that the suit was *in personam*, as follows: "If the cause is a maritime cause, subject to admiralty cognizance, jurisdiction is complete over the person as well as over the ship; it must in its nature, be complete, for it cannot be confined to one of the remedies on the contract, when the contract itself is within its cognizance."

In Church *v.* Shelton, 2 Curtis, C. C. 271, the libel alleged that certain boxes of sugar were shipped by the libellant at Havana, to be carried to Boston and delivered to the libellant for an agreed freight; that bills of lading were signed, etc., that the vessel got ashore near Key West and was relieved by wreckers and went into that port in distress; that the amount of salvage was referred by the master to arbitrators, and the libellant upon information of what was thus due paid the sum of six thousand two hundred dollars as his proportion of the salvage compensation; that he afterwards discovered that the vessel was fraudulently wrecked by the master in concert with the wreckers, and that the respondents were also ignorant of the fact until after the money was paid, — and that they afterwards recovered the money by a suit in the admiralty court at Key West. It was contended by the respondents that the suit was merely to recover back money which they had received at Key West by reason of the suit there, and was but another form of an action for money had and received, over which the admiralty had no jurisdiction. But the court held that the action was brought for the breach of a contract of affreightment, and that as the court had jurisdiction over the entire contract, it could proceed to inquire into all its breaches, and all the damages suffered thereby however peculiar they might be, and whatever issues they might involve.

[2] See ante, p. 502, n. 2.

[3] Steamboat New World *v.* King, 16 How. 469. The appellee in this case was a passenger on a voyage from Sacramento to San Francisco, and this suit was brought for injuries sustained by the negligence of those in charge of the vessel. The question of jurisdiction was argued, but it appears to have been assumed to exist by the majority of the court, as nothing is said in regard to it. Mr. Justice *Daniel* dissented, however, on the express ground that the court had no jurisdiction. In New York the general doctrine has been laid down in several cases that "ships engaged in carrying passengers on the high seas for hire, stand on the same footing of responsibility, according to the maritime law as those engaged in carrying merchandise, the passage money being equivalent to the freight; that therefore, on a breach of a passenger contract and damage resulting, the ship as well as the owner, is bound to respond." The Pacific, 1 Blatchf. C. C. 569; The Aberfoyle, id. 360; The Zenobia, Abbott, Adm. 48. See also, Walsh *v.* The Steamboat M. H. Wright, 1 Newb. Adm. 494.

sume the decision referred to was intended to be confined to the exact case before the court, so that there would still be jurisdiction over a contract of affreightment between ports of the same state on the sea, or on waters navigable from the sea. There is also jurisdiction over contracts with material-men;[1] jettisons and maritime contributions and averages;[2] pilotage;[3] surveys of ship and cargo;[4] and generally all assaults and batteries, damages and trespasses occurring on the high seas. Whether in relation to this last subject, the decision in The Genesee Chief *v.* Fitzhugh,[5] will apply in its full extent, so as to include, for instance, any injuries from a quarrel between two persons accidentally on board a boat on any of our navigable streams may certainly be doubted. It is said that torts committed on tide waters within foreign ports are perhaps under admiralty jurisdiction.[6] But would it now be said that this artificial boundary of tide waters is to be overleaped for this purpose also; and that torts in a navigable stream in Asia or Africa, for instance, far above tide waters are now within admiralty jurisdiction? An examination

[1] The General Smith, 4 Wheat. 438. This is now limited by the twelfth admiralty rule. See ante, p. 505, n. 1.

[2] General average seems clearly to be a subject of admiralty jurisdiction, but some doubt has been thrown upon the question by the decision of the supreme court in Cutler *v.* Rae, 7 How. 729. It was here held that an action *in personam* by the owner of the vessel against the owner of the cargo would not lie after the cargo had been delivered up. It has however been held that a libel *in rem* is maintainable against the vessel, by a shipper entitled to contribution from the ship. Dupont de Nemours *v.* Vance, 19 How. 162; Dike *v.* Propeller St. Joseph, 6 McLean, C. C. 573; The John Perkins, U. S. C. C., Mass., 1857, 21 Law Reporter, 87, 96. See these cases commented on, ante, Vol. I. p. 333, 334.

[3] Hobart *v.* Drogan, 10 Pet. 108; The Anne, 1 Mason, 508; and cases ante, Vol. I. p. 479, note 4.

[4] This was the opinion of Mr. Justice *Story*, in his Commentaries on the Constitution, Vol. III. p. 532, § 1665, citing Janney *v.* Columbian Ins. Co., 10 Wheat. 411. The only authority for this position in the case cited, is the dictum of Mr. Justice Johnson, which is as follows: "In other parts of the world, it is very generally exercised as an incident to the admiralty power; and the admiralty jurisdiction under our system, can only be exercised under the laws of the United States." See also the language of Mr. Justice *Story*, in the case of The Sch. Tilton, 5 Mason, 465, 474. We have no doubt but that on principle our admiralty courts should have jurisdiction to order a survey, and decree a sale of a damaged ship on a petition by the master, but we are not aware of any decision where it is so held, and such a procedure is not usual in practice.

[5] The Genesee Chief *v.* Fitzhugh, 12 How. 443.

[6] Thomas *v.* Lane, 2 Sumner, 1.

of the case of The Genesee Chief, leads irresistibly to the conclusion that the decision was grounded upon what seemed to be a necessity. Our lakes and rivers carried our ships between our own States, and in some instances between them and foreign countries, and the remedies and resources of admiralty were as much demanded by that inland commerce, as by our foreign commerce. If any such necessity, or reason exists, as to the punishment of crime committed in a river of China or Africa, it must be because no other tribunal to which our country would be willing to confide the case, would be likely to take cognizance of it.

Policies of insurance have been asserted and reasserted to be "maritime contracts" within the admiralty meaning of the word, and therefore, within the admiralty jurisdiction. We cannot, however, but regard this matter as still open to much question; and should expect that many of our courts of admiralty would refuse to receive a libel upon a common policy of insurance and try the case in admiralty. Our reason is simply this: the contract of insurance is made between parties one of whom certainly is in no other sense a "maritime" person than all must be who have any connection, direct or remote, close or slight, with the sea. And the contract itself, although it relates to a ship, or a cargo and a voyage, is a land contract and not a sea contract, unless every contract is necessarily maritime which relates to property that is water-borne, and we do not believe that the word has, in law, a meaning so extensive.[1]

[1] In the leading case of De Lovio *v.* Boit, 2 Gallis. 398, Mr. Justice *Story* in a most elaborate and exhaustive decision held that a policy of insurance is a maritime contract, and within the admiralty jurisdiction of the United States courts. This case was decided in 1815, and in 1822, the jurisdiction was affirmed in Peele *v.* Merchants' Ins. Co., 3 Mason, 27, and again in 1842, in the case of Hale *v.* Washington Ins. Co., 2 Story, 176. In 1855, the same question came before Mr. Justice *Curtis*, in the case of Gloucester Ins. Co. *v.* Younger, 2 Curtis, C. C. 322, and the jurisdiction was again affirmed, but solely on the ground that it was not an open question in the first circuit, the learned judge expressly declining to express his own opinion upon the question. After speaking of the case of Cutler *v.* Rae, 7 How. 729, he said: "Still, an inquiry into the extent of the admiralty jurisdiction, under the constitution of the United States, is, to some extent, at least, an historical question; and whether a particular class of contracts is within that jurisdiction, is to be determined, not by reasoning *à priori*, but by examining into the actual extent of that jurisdiction, as exercised in this country prior to the formation of the constitution. This may lead, as comparing the cases of New Jersey S. N. Co. *v.* Merchants' Bank, and Cutler *v.* Rae, and The Genesee Chief, it may, perhaps, be said, it has led to theoretical anomalies, which can scarcely be reconciled, but which may, nevertheless, be sound deductions from correct premises."

The English courts of admiralty declined for a long time jurisdiction in what are called *petitory* suits, in which the mere title to property is in question or litigation. Quite recently this jurisdiction has been restored and exercised; and we have no doubt that formerly suits of this description came before the courts as freely as *possessory* suits, in which an owner by legal title demands that a possession, which is unjustly withheld, should be restored to him.[1] In this country, no such distinction is made, one class of actions being as much within the reach of the court as the other.[2] It would seem also, that the courts

[1] Of this, *Kent* says, Vol. I. p. 371, "The distinction does not appear to rest on any sound principle, for the question of title is necessarily involved in that of the possession;" and the remarks of Sir *Wm. Scott*, show the great embarrassment in which the court is thrown by this unjust and arbitrary restriction of their jurisdiction. In The Aurora, 3 Rob. Adm. 133, 136, he said: "It is well known that it was formerly held for a very long time, and down to no very distant period, to be within the jurisdiction of this court to examine and pronounce for the title of ships, on questions of ownership. It was not till some time after the restoration, I believe, that it was informed by other courts that it belonged exclusively to them; since that time, the court has been very cautious not to interfere at all in questions of this nature." In The Warrior, 2 Dods. 288, 289, he said: "A question of title may occur incidentally in a cause of possession, and it then becomes necessary for the court to inquire into the title, at least so far as to satisfy itself that it may safely decree possession to the party seeking it. It cannot be laid down that the court is to decline its jurisdiction in a cause of possession, on the mere averment of one of the parties, that there is a conflicting claim of title." In The Pitt, 1 Hagg. Adm. 240, 244, he said: "I may, therefore, lay it down as a rule for the conduct of this court, that it is only in simple cases, in cases which speak for themselves, that it can act with effect; but in those which, being complex, require a long and minute investigation, it cannot proceed with safety." Sir *C. Robinson* followed these decisions closely in The John, 2 Hagg. Adm. 305; The Fruit Preserver, id. 181. See also, The Martin of Norfolk, 4 Rob. Adm. 293. By 3 and 4 Vict. c. 65, the English court has its ancient power in these cases restored. This act provides that the court "shall have jurisdiction to decide all questions as to the title to, or ownership of any ship or vessel, or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage, damage, wages, or bottomry, which shall be instituted in the said court after the passing of this act." Before this act was passed, it was uniformly held that the court could look only to the legal title, and not to a beneficial or equitable interest. The Sisters, 5 Rob. Adm. 155. Mr. *Conkling* remarks that "it appears, by a case since decided, that this principle is still adhered to by the court, notwithstanding its enlarged powers and modified constitution." 1 Adm. Juris. 339, citing The Valiant, 1 W. Rob. 64. This case was, however, decided in July, 1839, before the passage of the act in question, which was on the 7th day of August, 1840. We shall consider this subject more fully hereafter. See post, ch. 5, sect. 1.

[2] Ward *v.* Peck, 18 How. 267; New England Ins. Co. *v.* Brig Sarah Ann, 13 Pet. 387; The Sch. Tilton, 5 Mason, 465; The Friendship, 2 Curtis, C. C. 426; Taylor *v.* The Royal Saxon, 1 Wallace, Jr. 311.

have jurisdiction over contracts of consortship[1] and wharfage[2] and towage.[3] But there is no jurisdiction in matters of account between part-owners,[4] although the part-owners sailed the vessel, and the libellant was a carpenter on board.[5] And there is no jurisdiction over an account between the owners of a vessel and their general agent for money paid to their use.[6] And the court has no power to decree the sale of a ship for an unpaid mortgage, nor, on that account, can it declare a ship to be the property of the mortgagees, and decree the possession of it to be given to them.[7] And in a late case, where the owners of different vessels agreed to form a line for carrying passengers and freight between New York and San Francisco, they dividing the profits between them, it was held to be but a contract for a limited partnership, and that an action for a breach of it would not lie in admiralty.[8]

[1] Andrews *v.* Wall, 3 How. 568. The appellees, in this case, had filed a petition in the admiralty court in Florida, setting forth that they were owners of a schooner, which had been consorted with the sloop Globe in the business of wrecking. That while so consorted, the Globe had performed a salvage service, and that payment had been decreed her by the admiralty court, and that a portion of the salvage was due the petitioners by virtue of the consortship, and prayed that the sum due them might be retained by the court and paid to them. Mr. Justice *Story*, delivering the opinion of the court, held that they had, on general principles, jurisdiction to maintain the suit, that it was to enforce a maritime contract for services to be rendered on the sea, and an apportionment of the salvage earned therein. The jurisdiction was also sustained on the independent ground that the suit was for proceeds in the hands of the admiralty, and that such suits might always be maintained by the parties in interest.

[2] Ex parte Lewis, 2 Gallis. 483; The Phebe, Ware, 360; Johnson *v.* The M'Donough, Gilpin, 101. See Ives *v.* The Buckeye State, 1 Newb. Adm. 69; and Russel *v.* The Asa R. Swift, id. 553.

[3] Ward *v.* Brig Banner, U. S. D. C., Michigan, 14 Law Reporter, 465.

[4] Steamboat Orleans *v.* Phœbus, 11 Pet. 175. And in a late case where the master of a vessel who was also part-owner, made a contract of affreightment with a lumber company, of which he was also a member, and the cargo was consigned to him, the supreme court refused to take jurisdiction, on the ground that there being a complicated account to adjust, the matter more properly belonged to a court of equity. Grant *v.* Poillon, 20 How. 162.

[5] Kellum *v.* Emerson, 2 Curtis, C. C. 79.

[6] Minturn *v.* Maynard, 17 How. 477.

[7] Bogart *v.* Steamboat John Jay, 17 How. 399. In Schuchardt *v.* Ship Angelique, 19 How. 239, it was held, where a mortgage existed upon the moiety of a vessel which was afterwards libelled, condemned and sold by process in admiralty, and the proceeds brought into the registry of the court, that the mortgagee could not file a libel against a moiety of the proceeds, but that his proper course should have been either to have appeared as claimant when the first libel was filed, or to have applied to the court by petition for a distributive share of the proceeds.

[8] Vandewater *v.* Mills, 19 How. 82.

It has also been determined that the admiralty has no jurisdiction over a preliminary agreement to execute a maritime contract, and Mr. Justice *Story* has said, that, "if there were a contract to build a ship, or to sign a shipping paper, or to execute a bottomry bond, and the party refused to perform it, it has never been my impression that the enforcement of such a contract belonged to the admiralty." [1]

[1] Andrews *v.* Essex F. & M. Ins. Co., 3 Mason, 6, 16. See also, The Sch. Tribune, 3 Sumner, 144.

CHAPTER II.

OF THE JURISDICTION OF THE SEVERAL COURTS OF ADMIRALTY IN THIS COUNTRY.

SECTION I.

THE SUPREME COURT OF THE UNITED STATES.

THIS court has no original jurisdiction in admiralty, but receives appeals from the circuit court, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars.[1] But no appeal lies from the district court to the supreme.[2] And to give the right of appeal to the libellant, the damages claimed in the libel must exceed two thousand dollars, and interest is not to be added in computing the amount, unless it is specially claimed in the libel.[3]

There is also jurisdiction where the decree in the circuit court was rendered *pro forma* because the presiding judge had been of counsel in the case.[4] But the court will not take jurisdiction by agreement of parties, if the amount in dispute, however agreed by counsel, is shown by the case, not to be sufficient,[5] or

[1] Act of March 3, 1803, ch. 40, § 2, 2 U. S. Stats. at Large, 244.

[2] The Sloop Sally *v.* The United States, 5 Cranch, 372.

[3] Udall *v.* Steamship Ohio, 17 How. 17; Olney *v.* Steamship Falcon, 17 How. 19. See Godfrey *v.* Gilmartin, 2 Blatchf. C. C. 340.

[4] Steamer Oregon *v.* Rocca, 18 How. 570.

[5] Mordecai *v.* Lindsay, 19 How. 199. In Gruner *v.* The United States, 11 How. 163, the vessel was seized for a violation of the registry laws, and while the suit was pending in the district court, a written agreement was filed by the district attorney and the proctor for the claimant, that the vessel should be sold and the proceeds paid into the registry of the court, to abide the ultimate decision of the suit, the rights of neither party to be prejudiced by the sale. The vessel was sold for $850, and was afterwards condemned. There was an agreement on record signed by

if the case is not of a maritime nature.[1] The appeal must also be from a final decree of the circuit court.[2]

Some controversy has arisen as to what is a final decree, but the following points may now be considered as settled. If the court decree that the libellant is entitled to recover damages, and the cause is sent to an assessor to determine the amount, this decree is not final;[3] and, generally, if a case is sent to a master, the decree is not final.[4] So if the property libelled is ordered to be restored with costs and damages, no appeal lies until the amount of the damages is ascertained.[5] The word "final" has been defined by the Supreme Court of the United States to apply to all judgments and decrees which determine the particular cause; and it is not necessary that the subject matter in dispute should be finally decided. Thus, if after the decree is pronounced, merely ministerial duties are to be performed, as the sale of mortgaged property on a decree ordering a sale, the decree is considered as final.[6] And if the jurisdiction of the inferior court is objected to, it would seem that the decis-

the attorneys of the parties admitting that the vessel was worth over two thousand dollars. The court held that the admission of the parties would be evidence of the value if nothing more appeared in the record, but that the consent of the parties could not give the court jurisdiction, and that as it appeared on the face of the record that the sum in controversy was below two thousand dollars, the appeal must be dismissed.

[1] Cutler *v.* Rae, 7 How. 729.

[2] See Canter *v.* American Ins. Co., 3 Pet. 307, 317. Mr. Justice *Story* in this case said: "It is of great importance to the due administration of justice, and is in furtherance of the manifest intention of the legislature, in giving appellate jurisdiction to this court upon final decrees only, that causes should not come up here in fragments, upon successive appeals."

[3] Chace *v.* Vasquez, 11 Wheat. 429. In Mordecai *v.* Lindsay, 19 How. 199, the case was decided in favor of the libellants in the district court, and then ordered to be sent to an assessor to report the amount. Without further proceedings being had, the respondents appealed to the circuit court, where the case was heard on its merits, and the decree of the district court reversed. The libellants then appealed to the supreme court, where the counsel moved that they might be permitted to amend the record by consent, by inserting in it what might be agreed upon by them as a final decree. But the court held, that as the case never came properly before the circuit court, it could not come before the supreme court, and the case was sent back to the circuit court that the appeal might be dismissed by it for want of jurisdiction, leaving the parties to obtain the final decree in the district court.

[4] Beebe *v.* Russell, 19 How. 283; Farrelly *v.* Woodfolk, 19 How. 288.

[5] The Palmyra, 10 Wheat. 502.

[6] Ray *v.* Law, 3 Cranch, 179.

ion of the court upon this question would be a final decree which might be appealed from.[1]

If the decree is rendered in respect to any subject which is merely within the discretion of the court, no appeal lies, as in respect to costs,[2] amendments,[3] a petition to open a decree,[4] to reinstate a cause which has been dismissed,[5] or to dissolve an injunction, unless the bill has been finally disposed of.[6]

When an order is made which is intended merely to carry out a decree, this cannot be said to be a final decree from which an appeal lies, as an order of sale in execution of an original decree;[7] or an attachment against a party who refuses to obey a decree of the court.[8]

In causes of seizure for the breach of the revenue laws, the right of appeal depends upon the value of the property at the time of seizure, and not on the net proceeds, after expenses, charges, duties, etc., are deducted.[9]

[1] Weston *v.* City Council of Charleston, 2 Pet. 449, 464. This case was brought before the court on a writ of error to the highest State court in South Carolina, under the 25th section of the judiciary act which provides "that a final judgment or decree in any suit in the highest court of law or equity of a State in which a decision in the suit could be had, ... where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity, ... may be reëxamined and reversed or affirmed in the Supreme Court of the United States." In the court of common pleas it was decided that a certain ordinance of the City of Charleston was unconstitutional; but on application to the highest court in the State the decision was reversed, and the writ of error was then brought; and it was held that the decree was a final one, and that the writ of error would lie. See also Holmes *v.* Jennison, 14 Pet. 540.

[2] Canter *v.* American Ins. Co., 3 Pet. 307; Harmony *v.* United States, 2 How. 210; United States *v.* Brig Malek Adhel, 2 How. 210, 237.

[3] Marine Ins. Co. of Alexandria *v.* Hodgson, 6 Cranch, 206; United States *v.* Buford, 3 Pet. 12; Walden *v.* Craig, 9 Wheat. 576; Chirac *v.* Reinicker, 11 id. 280.

[4] Brockett *v.* Brockett, 2 How. 238.

[5] Welsh *v.* Mandeville, 7 Cranch, 152.

[6] McCollum *v.* Eager, 2 How. 61; Gibbons *v.* Ogden, 6 Wheat. 448; Verden *v.* Coleman, 18 How. 86. See also, generally, Smith *v.* Trabue, 9 Pet. 4; Boyle *v.* Zacharie, 6 Pet. 648; Toland *v.* Sprague, 12 Pet. 300; Evans *v.* Gee, 14 Pet. 1.

[7] Carr *v.* Hoxie, 13 Pet. 460.

[8] McMicken *v.* Perin, 20 How. 133.

[9] United States *v.* 84 Boxes of Sugar, 7 Pet. 453.

SECTION II.

OF THE CIRCUIT COURTS OF THE UNITED STATES.

These courts have only an appellate admiralty jurisdiction from a district court where the matter in dispute, exclusive of costs, exceeds the sum or value of fifty dollars,[1] and the appeal can be made only from *final* decrees of a district court.[2] As to all proceedings subsequent to the appeal, they are incidents to the principal cause, and belong to the court which remains in possession thereof.[3] If there be an appeal to the supreme court, the property, in proceedings *in rem*, remains in the circuit court, and will be diposed of as the supreme court directs.[4]

The jurisdiction, both of the circuit and district courts, in prize as well as other causes, is limited by the bounds of their respective circuit or district; and it is therefore essential that the *person* or the *thing* against which the suit is directed, be within

[1] Act of March 3, 1803, ch. 40, § 2, 2 U. S. Stats. at Large, 244.

[2] Thus where a final decree of condemnation had been made of forfeited property, and no appeal had been interposed, and after execution had been issued, the parties obtained a remission from the secretary of the treasury, and petitioned the district court that the executions, which had been issued, might be superseded, and they permitted to comply with the terms of the remission, and the district court having refused to grant the petition, the petitioners appealed to the circuit court, the court dismissed them, on the ground that the appeal was not regularly before the court. The final decree was made some time before, and no appeal had been made, and it had been settled in McLellan *v.* United States, 1 Gallis. 227, "that this court has no jurisdiction over the proceedings on the bond, which is but an admiralty stipulation, unless it has possession of the cause to which it belongs." The Brig Hollen and Cargo, 1 Mason, 431. See also, Mordecai *v.* Lindsay, 19 How. 199, and cases *supra*.

[3] The Grotius, 1 Gallis. 503; The Collector, 6 Wheat. 194. In this case, it is said to be irregular for the marshal to distribute proceeds without order of court, but it may be cured by consent of all parties, if there be no *mala fides*.

[4] The Collector, 6 Wheat. 194. The 24th section of c. 20, Acts of 1789, 1 U. S. Stats. at Large, 85, prescribes that "the supreme court shall not issue execution in causes that are removed before them by writs of error, but shall send a special mandate to the circuit court to award execution thereon." The act of 1803, ch. 40, which changes the mode of carrying the case up from a writ of error to an appeal, provides that such appeals shall be subject to the same rules, regulations, and restrictions as are prescribed by law in cases of writs of error.

their local jurisdiction.[1] The exceptions to this rule, are those for which express provision is made by law. It would seem to follow, therefore, that no court can send process into another district than that in which they sit, to compel appearance; nor can a *prize* proceeding be directed against a person who is neither an inhabitant of nor actually within the district where process is served. So a decree against merchandise rendered in one district, is valid against the merchandise, if it appear that the party charged with it had or has possession of it or of its proceeds; and it may be enforced on proper application to courts of other districts. But a libel in another district, against a resident citizen thereof for the value of the merchandise, he being charged with having it come into possession since the condemnation, cannot be sustained if he pleads that he was no party to the proceedings in the district where the decree was made, and that no process was served upon him there.[2]

[1] In Ex parte Graham, 4 Wash. C. C. 211, 212, the court, speaking of the inability of the courts to carry process out of their own districts, and reciting the provisions of the Judiciary Act of 1789, said: "'These provisions appear most manifestly to circumscribe the jurisdiction of those courts as to the person of the defendant, by the limits of the district where the suit is brought; and that the process of those courts was considered by the legislature to be bounded by the same limits, is very obvious from two subsequent acts passed; the one on the 2d of March, 1793, authorizing subpœnas for witnesses to attend in the courts of one district to run into any other district, not exceeding in civil cases one hundred miles from the place of holding the court; and the other on the 3d of March, 1797, which authorizes writs of execution upon judgments obtained at the suit of the United States, in any of their courts in one State, to run, and be executed, in any other State or Territory. It is very apparent that these provisions were made, not because they were supposed by congress to be necessary in consequence of the eleventh section of the judicial act before mentioned, but because the jurisdiction of the courts was essentially confined by their organization within the limits of their respective districts, for, it is to be observed, that that section applies exclusively to *original suits*, and to the *parties to those suits*, and therefore it imposed no restraint as to writs of execution, and subpœnas for witnesses, so as to render the above provisions at all necessary." See also, Toland *v.* Sprague, 12 Pet. 300, 330; and post, p. 536.

[2] For the rules in these cases, see Wilson *v.* Graham, 4 Wash. C C. 53; Ex parte Graham, 4 Wash. C. C. 211.

SECTION III.

OF THE DISTRICT COURTS OF THE UNITED STATES.

The statute of 24th September, 1789,[1] gives to these courts original cognizance of all civil causes of admiralty and maritime jurisdiction; and they thereby acquired all the powers of the courts of admiralty, both on the instance and the prize sides, and have jurisdiction of all cases of maritime trespass or tort.[2]

By virtue of this general admiralty jurisdiction, these courts may in cases *in rem* deliver property on bail or stipulation,[3] and enforce summarily by judgment and execution, the security, or compliance with the terms of the bailment. Whether this security be under seal, or like a recognizance without seal, makes no difference. And if it have a seal, and is yet void as a bond, it may be good as a stipulation.[4] The court always orders that the stipulation be taken on the direct application for the property by the claimant; and having jurisdiction over the principal cause, has it necessarily over all its incidents, and may by monition, attachment or execution, enforce its decrees against all who become parties to the proceedings.[5]

[1] Ch. 20, § 9, 1 U. S. Stats. at Large, 76.

[2] Davis *v.* A New Brig, Gilpin, 473; The Amiable Nancy, 1 Paine, C. C. 111, 3 Wheat. 546, and cases cited in the reporter's note; Keene *v.* The United States, 5 Cranch, 304.

[3] The Brig Alligator, 1 Gallis. 145. In Lane *v.* Townsend, Ware, 286, it was held that "any instrument taken to secure the appearance of a party to answer a libel in the admiralty, is to be considered not as a bail bond at common law, but as an admiralty stipulation, and construed according to the rules and practice of the courts of admiralty, touching such stipulations," and that "stipulations taken in the progress of a cause for the purpose of sustaining and rendering effectual the jurisdiction of the court, are to be interpreted as to the extent and limitation of the responsibility created by them, by the intention of the court which required them, and not by the intention of the parties who are bound by them."

[4] Lane *v.* Townsend, Ware, 286.

[5] See The Brig Hollen and Cargo, 1 Mason, 431; The Brig Alligator, 1 Gallis. 145–149; The Flora, 1 Hagg. Adm. 298; and cases cited ante, p. 501, n. 1.

The original jurisdiction of the district court is not ousted by any State laws which relate to the same subject. As for example, laws respecting pilotage or liens of mechanics or material-men, even if their laws are adopted and enforced by the courts of the United States.[1] Their effect is, then, to give to the State courts a jurisdiction on these subjects concurrent with that of admiralty. A party may elect to go into either court, but if he goes into admiralty he will recover there no more than the State laws would permit him to recover in the State courts. In such a case, and in all other cases where the State court and the United States court have concurrent and coördinate jurisdiction, the right to maintain jurisdiction belongs to that court which exercises it first and takes possession of the thing. If, therefore, the sheriff attach property, and it is afterwards libelled in the district court, and process of attachment is delivered to the United States marshal, he should return the previous attachment, and not attempt to take it from the sheriff's hands.[2] The same may be true where the State court has, by virtue of a special statute, power to enforce to the same extent, the claim which is the subject of the suit in the admiralty court, in which case the party would lose nothing by being deprived of his right to sue in admiralty.[3]

Further than this we are not inclined to go, and were the question still an open one, we should say that the lien for seamen's wages might be enforced in the admiralty court against the vessel, notwithstanding she was under arrest in the State court. Our reasons for this are that the lien for wages is by our law, paramount, and would attach to the ship, notwithstanding she

[1] Hobart *v.* Drogan, 10 Pet. 108.

[2] Hagan *v.* Lucas, 10 Pet. 400; The Oliver Jordan, 2 Curtis, C. C. 414; The Robert Fulton, 1 Paine, 620. It was held in these last two cases, that a material-man could not enforce his lien in the admiralty court while the vessel was under arrest by State process, by another material-man.

[3] Keating *v.* Spink, 3 Ohio State, 105. It was held in this case, that a sheriff who had a vessel under arrest by process under the water craft law of the State, had no right to surrender it to the United States marshal on a suit for seaman's wages in the admiralty court, and that he was liable to the creditor in the suit in the State court for having given up the possession. Some reliance was placed on the distinction pointed out in the text, that by the law of Ohio the seamen might have intervened and had their claim for wages satisfied in the State court.

were sold by order of a State court, and consequently no injury could result to the attaching creditor; and also on account of the great hardships which result from depriving seamen of their wages while the suit in the State court is dragging its weary length along, through several years. But a majority of the Supreme Court of the United States having decided otherwise, we must take the law as we find it, and accordingly state that when a vessel is under arrest by a State court, for any debt of the owner, the power of the admiralty is for the time entirely suspended.[1] But the sheriff may waive his right of possession,

[1] This precise point arose in the case of Poland *v.* The Brig Spartan, Ware, 134, 147. The suit was brought in the district court of Maine, for seamen's wages, against the freight and cargo of the vessel. One defence was that the property had been attached by sundry creditors of the charterers, and the suits were then pending in the State court. Mr. Justice *Ware* said: "It is argued that, as different creditors are each pursuing their own rights against this property in different courts, it is a proper rule, to prevent collision of judicial authority, to give precedence to those who first lay their hands on the [redacted]nd. This priority might be decisive, if both creditors stood in the same relation to this specific property. But the reason no longer holds when the claim of one of the parties is, in its nature, a privileged claim. The very essence of a privilege is to give the creditor a preference over the general creditors of the debtor; and if such be the claim of the seamen, the attachment only created a lien on the property subject to such prior incumbrance. It can only extend to the whole right of the owner, and that was to hold the property after discharging the lien." And in Certain Logs of Mahogany, 2 Sumner, 589, which was a libel *in rem* for freight, it was objected that a replevin suit was then pending in the State court to determine the right of property to the cargo libelled. *Story*, J., said: "A suit in a State court by replevin, or by an attachment under process, of the property, can never be admitted to supersede the right of a court of admiralty to proceed by a suit *in rem* to enforce a right against that property to whomsoever it may belong. The admiralty suit does not attempt to enter into any conflict with the State court, as to the just operation of its own process; but it merely asserts a paramount right against all persons whatever, whether claiming above or under that process. No doubt can exist, that a ship may be seized under admiralty process for a forfeiture, notwithstanding a prior replevin or attachment of the ship then pending. The same thing is true as to the lien on a ship for seamen's wages or a bottomry bond." See also, Riggs *v.* The Sch. John Richards, 1 Newb. Adm. 73. In the late case of Taylor *v.* Carryl, 24 Penn. State, 259, the vessel arrived in Philadelphia in October, 1847. She was attached in the State court for a debt due from her owners in November of that year. A libel for wages was filed in the admiralty court, January 21, 1848. A sale was ordered by that court on the 4th of February, and the vessel was sold by the marshal on the 15th of the same month. In the State court a sale was ordered on the 29th of January, and the vessel was sold on the 9th of February. The present suit was an action of replevin to determine the title as between the purchasers at the two sales, and the court held that the district court had no power over the property while it was in the possession of the State court. While the replevin suit was pending, the purchaser of the vessel under the sale by the

and if the marshal can obtain possession of the vessel with his consent, or with the consent of his deputy, the right of the sheriff is at an end.[1] At common law, if the property of one person is attached as the property of another, the former may assert his right of property by a writ of replevin, and it has been held that he may do the same in admiralty by a petitory suit.[2]

marshal, instituted a petitory suit in the district court, and the vessel was ordered to be delivered to him. On appeal to the circuit court, Mr. Justice *Grier*, though he was clearly of the opinion that the petitioner had a good title, yet held that the replevin suit pending in the State court was a good bar to further proceedings in admiralty. Taylor *v.* The Royal Saxon, 1 Wallace, Jr. 311. The suit in the State court was then brought before the Supreme Court of the United States by a writ of error, and the decision of the State court was held to be correct. 20 How. 583, *Taney*, C. J., *Wayne*, J., *Grier*, J., and *Clifford*, J., dissenting. We would call the attention of the profession to the opinion of the learned Chief Justice in this case, as one which has been seldom equalled in a clear and forcible exposition of the rights and powers of the courts of admiralty in this country. After remarking that the power which created the court could give the right of trial by jury, if it saw fit, the learned judge continued: "I can therefore see no ground for jealousy or enmity to the admiralty jurisdiction. It has in it no one quality inconsistent with or unfavorable to free institutions. The simplicity and celerity of its proceedings, make a jurisdiction of that kind a necessity in every just and enlightened commercial nation. The delays unavoidably incident to a court of common law, from its rules and modes of proceedings, are equivalent to a denial of justice, where the rights of seamen or maritime contracts or torts are concerned, and seafaring men the witnesses to prove them; and the public confidence is conclusively proved by the well-known fact, that in the great majority of cases, where there is a choice of jurisdictions, the party seeks his remedy in the court of admiralty in preference to a court of common law of the State, however eminent and distinguished the State tribunals may be." In Clark *v.* Sch. Gazelle, U. S. D. C., Mass., March, 1858, the court refused to issue a warrant of arrest while the vessel was in the custody of the State court, but, as soon as she was sold by the sheriff, granted the requisite permission, holding that the sale did not divest nor impair the lien of the seamen for wages.

[1] The Julia Ann, U. S. D. C., Mass., 1858, 21 Law Reporter, 21. The vessel, in this case, was in the custody of the sheriff, and in possession of a keeper appointed by the sheriff, and the party in possession had written authority from the sheriff to hold the vessel. This fact was not disclosed to the marshal, but the keeper consented to hold the vessel under the marshal, and did so until the sale, and received his fees therefor. When the sheriff was informed that the keeper was holding under the marshal, he did not oust him, but said he knew nothing about the marshal, and told the keeper to keep on, and no action was taken in the court till after the sale. Under these circumstances the court held that the purchaser at the sale by the marshal was entitled to possession.

[2] The Taranto, U. S. D. C., Mass., 12 Law Reporter, 5. While acquiescing in the justice of this decision, we do not see how the marshal could take the vessel under the decision in Taylor *v.* Carryl, *supra*. And this case is a good example of the power of a person to effectually deprive the court of admiralty of its entire jurisdiction, under that decision. In the case of The Taranto, a company of Californians were about to

In England, a ship was seized by a sheriff upon process from the Court of King's Bench; afterwards, admiralty process, issued in a suit for wages, under which she was sold, and the claim of the sheriff to the surplus proceeds was allowed as against the former owner of the ship, on the ground that admiralty would take a judgment on record as a debt, although it would not inquire into the claims of general creditors.[1]

The legislature of a State can neither amend the judgment nor determine the jurisdiction of any of the courts of the United States.[2]

The judge of the district court may hold court, at any place within the district that "the nature of the business and his discretion shall direct;"[3] and orders, generally, may be at chambers as well as in open court. It is said that the various *ex parte* orders which admiralty proceedings sometimes require quite suddenly, make this rule necessary.[4] It has, however, been seriously doubted by Mr. Justice Story whether the district court can receive stipulations in vacation and deliver property thereon, before the return term of the process.[5] We believe, however, that this

sail for California in a vessel which they had purchased, but which stood in the name of their agent, who refused to give up the vessel. The vessel was also under attachment in the State court, in a suit against the agent for supplies furnished. The court held that as the property did not belong to the agent the attachment was not valid, and decreed possession of the vessel to the libellants. As to the stores not paid for, it was decreed that the libellants could not be entitled to them. The opinion in this case was rendered in less than two weeks after the libel was filed, whereas if the owners had resorted to a writ of replevin, supposing they had been able to give bonds to double the value of the vessel, the case could not have been decided under a year, and probably would have been in court much longer, yet, if we understand the effect of the decision in Taylor *v.* Carryl, the common-law remedy was the only one left to the owners, although as their whole property was invested in the vessel, it might have been impossible for them to have availed themselves of it.

[1] The Flora, 1 Hagg. Adm. 298. The creditor in this case, who seized the vessel under the authority of the King's Bench, consented to the sale, and claimed merely to come in for the surplus after paying the sum due the seamen. "But," says *Taney*, C. J., in Taylor *v.* Carryl, 20 How. 583, 603, "if the marshal could not lawfully arrest while she was in the possession of the sheriff, he could not lawfully sell under that arrest, nor while the sheriff still held possession, and no consent of parties would make it a valid marshal's sale, and give a good title to the purchaser, if the sale was without authority of law."

[2] United States *v.* Peters, 5 Cranch, 115.

[3] Act of 1789, ch. 20, § 3, 1 U. S. Stats. at Large, 73.

[4] United States *v.* Sch. Little Charles, 1 Brock. C. C. 380.

[5] In Ex parte Robbins, 2 Gallis. 320, 322, *Story*, J., said: "Admitting that the

is done in practice, but we think not against the will or without the consent of the libellant.

SECTION IV.

OF APPEALS GENERALLY.

By an appeal, the judgment and decree of the court are suspended; and the whole cause both as to its law and its fact, is to be heard *de novo* in the appellate court.[1] Nor is the cause a *res adjudicata*, until the final sentence of the appellate court. Any statute, therefore, which is passed before such final decree, is to be considered, and if the case before the court arose on a statute which is repealed[2] or expires by its own limitation[3] before the

district court can deliver property on bail in vacation, and before the return term of the process (which admits of very serious doubts), no delivery on bail could properly be made without notice to the district-attorney (the United States being interested in the suit), and a hearing before the district judge." See also Brig Alligator, 1 Gallis. 145, 148, cited *supra*, p. 521, n. 3.

[1] Anonymous, 1 Gallis. 22. It was held in this case that the circuit court had authority to allow amendments in revenue cases or proceedings *in rem* brought by appeal from the district court. In Gloucester Ins. Co. *v.* Younger, 2 Curtis, C. C. 322, 335, the case came before the circuit court under an agreement that the decision of the district judge should be final on all questions of fact, and that no evidence should be introduced in the appellate court except the opinion of the district judge, or a statement of facts made thereon; but that all questions of law from facts proved, were to be open on appeal. Mr. Justice *Curtis* disapproved of this course and offered to discharge the agreement, but as neither party desired it, he determined the case on the agreement, although he stated that he had encountered much embarrassment in doing so, and should execute a similar agreement afterwards with much reluctance, if at all.

[2] An interesting case which finally turned on this point occurred in Louisiana. The Act of Congress of March 2d, 1807, 2 U. S. Stats. at Large, 428, passed for the prevention of the slave-trade, directed that any vessel hovering about and intending to land negroes on the coast of the United States, should be forfeited, and the negroes delivered to any persons appointed by the several States for the purpose of disposing of them. The Josefa Segunda was libelled under this act, and the cargo of negroes delivered to the sheriff of Louisiana, in accordance with a statute of that State, which was passed in pursuance of the act of congress, and which also directed that one half the proceeds of the sale of such negroes should be delivered to the treasurer of the

[3] In Yeaton *v.* United States, 5 Cranch, 281, Marshall, C. J., said: "In admiralty cases, an appeal suspends the sentence altogether, and it is not *res adjudicata* until the

final decree is passed, the case is at an end. But if the property does not follow the case, the court in whose custody it

Charity Hospital at New Orleans, and one half to the commanding officer of the capturing vessel, meaning the public vessel contemplated by the act of congress. In 1820, the final decree of condemnation was pronounced in the supreme court. 5 Wheat. 338. In the mean time, the sheriff, by the consent of all parties, had sold the negroes and lodged the proceeds in the United States Bank, subject to the order of the court below. To the proceeds of this sale, there were seven claimants, none of whom fell within the description, in the statute of Louisiana, of the individuals who should be entitled to them. Their claims were, therefore, rejected by the supreme court, in 1825. 10 Wheat. 312. As to the proceeds of the sale of the vessel, the court said, 10 Wheat. 331, 332, "Upon the best consideration which we have been able to give the case, we are of opinion that it is a *casus omissus*, or rather that all the beneficial interest vests in the United States. The remarks which have already been made, dispose of the case as far as respects the proceeds of the vessel; and we think they are decisive as to the claim to the proceeds of the sale of the negroes. The case as to this matter, is also a *casus omissus* in the act of Louisiana."

In 1830, the case came up again, *nom.* United States *v.* Preston, 3 Pet. 57, on "appeal from so much of the decree of the court below as awarded to the State of Louisiana, the proceeds of the sales of certain slaves." The court said, "that as the final condemnation in this court took place March 13, 1820, and as previous to that time was passed the act of March 3, 1819 (3 U. S. Stats. at Large, 450 and 532), by which a new arrangement is made as to the disposal of persons of color, seized and brought in under any of the acts prohibiting the traffic in slaves, the power to deliver them to the order of the States was taken away before the final decree of this court." Then, according to the principle of Yeaton *v.* United States, 5 Cranch, 281, if they had been specifically before the court at the date of that decree, they must have been delivered, not to the State according to the act of 1807, but to the United States, according to the act of 1819. But they had already been sold, and the court said, "We would not be understood to intimate that the United States are entitled to this money, for they had no power to sell. Nor do we feel bound to remove the difficulties which grow out of this state of things." This was indeed a curious case. The slaves were sold by consent of the parties, before final condemnation of the vessel. The disposal of them was in violation of the law regulating such matters at the time of the decree. The sheriff, therefore, acted wrongfully, but was not liable to anybody, as he had only converted forfeited property into another form. But under the laws relating to the slave-trade, there was no one who could claim this money; neither the State of Louis-

final sentence of the appellate court be pronounced. The cause in the appellate court is to be heard *de novo*, as if no sentence had been passed. In prize causes, the principle has never been disputed, and in the instance court, it is stated in 2 Browne's Civil Law, that in cases of appeal it is lawful to allege what has not before been alleged, and to prove what has not before been proved. The court is, therefore, of opinion that this cause is to be considered as if no sentence had been pronounced; and if no sentence had been pronounced, it has long been settled on general principles, that after the expiration or repeal of a law no penalty can be enforced nor punishment inflicted for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." See also, United States *v.* Ship Helen, 6 Cranch, 203; Schooner Rachel *v.* United States, 6 Cranch, 329.

remains may always make any proper and necessary order respecting it.[1]

Questions have arisen as to the effect of joinder of parties on the right of appeal. The statute defines the amount which gives the right; and in suits for torts, unless an *ad damnum* be claimed equal to the amount which gives the right of appeal, that right does not exist. But in admiralty, parties are permitted to join, for convenience and economy, whose rights and interests are so distinct and independent that they could not be joined at common law. And it seems to be now settled, that no party can appeal, unless he has himself, and separately from others, a claim, or unless the opposite party has recovered against him, separately, an amount, which, by itself, is equal to that which by the terms of the statute, gives the right of appeal. Thus, all the crew of a ship may join in libel for wages; but only he whose claim exceeds fifty dollars, separately considered, can appeal to the circuit court; and only he whose claim exceeds two thousand dollars can appeal thence to the supreme court.[2] And where several libels were filed by shippers of cargo to recover for damages done to their goods, and the actions were ordered to be consolidated by the court, it was held, that the interest of the parties was distinct, and no appeal would lie, except where the separate amount demanded by each libellant exceeded two thousand dollars.[3] When, however, many libellants join in one libel, and their interests are joint, although not coequal, then an appeal lies, if the total amount exceed the sum required by the statute, although the amounts which would belong to each one, is less.[4] In respect to salvage claims, it has been decided,

iana nor the claimants, for so the court decided; not the United States, for there is no law by which the United States receives the price of slaves; not the slaves themselves, of course. The $65,000 deposited by the sheriff of the parish of New Orleans in the United States Bank lies there yet (or its remains lie there), so far as we know or can infer from the law.

[1] The Grotius, 1 Gallis. 503, per *Story*, J.; The Collector, 6 Wheat. 194.

[2] Oliver *v.* Alexander, 6 Pet. 143.

[3] Rich *v.* Lambert, 12 How. 347.

[4] Shields *v.* Thomas, 17 How. 3. In this case, the representatives of a person deceased claimed, under a bill in equity, moneys which Shields, the administrator, had converted to his own use. The complainants filed a bill in the Chancery Court of Kentucky, and obtained a decree which exceeded $2,000, the portion due each complainant being decreed to him separately, and being less than $2,000. A motion was made to dismiss

that an appeal will not lie to the supreme court where the amount of salvage due from any one owner of the property saved is less than two thousand dollars, although the whole amount due exceeds that sum. In other words, although the suit may be *in rem* against all the property saved, yet the rights and liabilities of each owner are separate and distinct.[1] But we should be inclined to hold, that the interests of salvors were so far joint that they might all appeal, if their united interest amounted to the requisite sum, provided the amount due from any one owner of the property saved was sufficient.[2]

the bill, because "the sum due each complainant is severally and specifically decreed to him, and that the amount thus decreed is the sum in controversy between each representative and the appellant" (Shields).

But the court held, "that the matter in controversy in the Kentucky court, was the sum due to the representatives of the deceased collectively, and not the particular sum to which each was entitled when the amount was distributed among them, according to the laws of the State. They all claimed under one and the same title. They had a *common and undivided interest* in the claim, and it was perfectly immaterial to the appellant, how it was to be shared among them. He had no controversy with either of them on that point; and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves and not with him. It is like a contract with several to pay a sum of money. It may be that the money when recovered, is to be divided between them in equal or unequal proportions. Yet, if a controversy arises on the contract, and the sum in dispute upon it exceeds $2,000, an appeal would clearly lie to this court, although the interest of each individual was less than that sum."

The court commented on the above cases as follows: "The case of Oliver *v.* Alexander, 6 Pet. 143, was a suit for seamen's wages. And although the crew are allowed by law, for the sake of convenience and to save costs, to join in a suit for wages, yet the right of each seaman is separate and distinct from his associates. His contract is separate, and his recovery does not depend upon the recovery of others, but rests altogether upon its own evidence and merits. And he does not recover a portion of the common fund to be distributed among the claimants, but the amount due to himself on his own separate contract. The case of Rich *v.* Lambert, 12 How. 347, was decided on the same ground. The several shippers who owned the goods which had been damaged had no common interest in the goods. The interest of each was separate, and his contract of affreightment was separate. And the libel of each was upon his own contract with the ship-owner, and for his individual and separate property. The cases of Stratton *v.* Jarvis, 8 Pet. 4, and Spear *v.* Place, 11 How. 522, were both salvage cases, where the property of each owner is chargeable with its own amount of salvage. The salvage service is entire; but the goods of each owner are liable only for the salvage with which they are charged, and have no common liability for the amounts due from the ship or other portions of the cargo. It is a separate and distinct controversy between himself and the salvors, and not a common and undivided one, for which the property is jointly liable."

[1] Stratton *v.* Jarvis, 8 Pet. 4; Spear *v.* Place, 11 How. 522.

[2] This precise point has not yet been decided, but it would seem to fall within the

If, however, the libellants in salvage formed two or more distinct sets or bodies, who performed distinct services and had distinct demands, they would not be regarded, we should presume, in the case of appeal, as one, although they joined in one libel; for they ought properly and perhaps would be required, to file several libels, only those joining who rest on a community of service, of merit, and of demand.

It is said to be always prudent, if one party appeals, for the other party to appeal also. For if he do not, and it should happen that the appellate court thought him entitled to a more favorable judgment, he would not have it without an appeal.[1] But what if he could not appeal? If a libellant in the district court for assault and battery, lays his *ad damnum* at one hundred dollars and recovers fifty, he can appeal and the defendant cannot.[2] If he appeals, and upon the new trial a full defence, or circumstances greatly lessening the libellant's claim were put in proof, we should be unwilling to say that the court could not regard them. We know of no authority for this, and should

principle adopted in the case of Shields *v.* Thomas, 17 How. 3, cited *supra*. See Marvin on Wreck and Salvage, § 253, 254, where the very learned author comes to the conclusion, that although the rights and interest of the salvors are separate and distinct, because "payment to one, or a release or forfeiture of the interest of one, being no bar to the recovery of the others," yet that they should be considered "as possessing a *quasi* joint interest for the purposes of appeals, and that they may appeal, whenever their united demand against any single claimant equals the sum required by law to authorize an appeal."

[1] Stratton *v.* Jarvis, 8 Pet. 4; Houseman *v.* Sch. North Carolina, 15 Pet. 40, 50; Canter *v.* American Ins. Co. 3 Pet. 307, 318; Airey *v.* Merrill, 2 Curtis, C. C. 8; Allen *v.* Hitch, id. 147. In all these cases, with the exception of that of Canter *v.* American Ins. Co., the libellant did not appeal, and it was held that he was limited to the amount which he had recovered in the inferior court. In Canter *v.* American Ins. Co., the court had decreed restitution of the property to the claimant, but nothing was said as to damages. The libellant only appealed, and it was held that the claimant could not demand damages in the appellate court. In Allen *v.* Hitch, *Curtis*, J., speaking of these cases said: "These cases show that the appellate court will neither increase the amount awarded below nor consider a subject of claim there decreed upon and denied, unless the party who desires a reversal of the decree, take an appeal."

[2] Shirley *v.* Titus, 1 Sumner, 447. The rule being in all cases of this nature that the "matter in dispute" within the meaning of the statute is the amount claimed by the libellant and not the amount actually recovered, but if the libellant recovers less and does not appeal, then the "matter in dispute" is the amount actually recovered, and the respondent has no right of appeal unless this amount is greater than the sum specified in the statute. Gordon *v.* Ogden, 3 Pet. 33; Smith *v.* Honey, id. 469; Cooke *v.* Woodrow, 5 Cranch, 13; Wise *v.* Columbian Turnpike Co. 7 Cranch, 276. But see Wilson *v.* Daniel, 3 Dall. 401.

infer from the general principles of admiralty, that such a result would follow only where the party who did not appeal might have done so had he thought proper. Indeed we should ourselves incline to the view, that if either party appeals, the rule that the appellate court tries the whole case, *de novo*, would cause the same justice to be done to both parties, as if both could have appealed, and both had appealed.

If the libel be for a maritime trespass, or assault and battery against two or more, and there is a several decree, each defendant has the same rights of appeal that he would have if there were separate libels; and if the decree be joint, the rule is the same if the defendants sever in their pleas or answers, or, if their answer, though joint, be a denial in the nature of a plea of the general issue. But if they join in a justification, it is said they must join in an appeal from a joint decree.[1]

[1] In Thomas *v.* Lane, 2 Sumner, 1, this subject is very fully discussed. It was a libel brought by a seaman against the master and the mate. The respondents made a joint answer, alleging also some matters in individual justification of the assault. The district court decreed one hundred dollars, in which decree Jordan the mate acquiesced, but Thomas the master did not, Story, J. said:—

"But the question here is not so much as to the effect of a joint justification or defence, as it is as to the several right of appeal of the parties charged with a tort in a joint libel. It seems admitted by the argument, that if the parties had severed in their defence (as they clearly might have done), that either of them might have sustained a several appeal. If that be so, it must be upon the ground, that a tort charged as joint may be established by proof of its being committed by either party; and in such case, that there may be a several decree of guilt as to one, and acquittal as to another. My opinion is, that there is no difference as to the right of appeal, whether the respondents sever or join in their answer or pleadings if the defence is several in its nature, as a general denial of the matters alleged, in the nature of the general issue; for then there may be a several decree of guilt as to one, and of acquittal as to the other. It may be otherwise where there is a joint justification by the respondents; for then it is difficult to perceive how either can separately contest its proof or sufficiency. The more pressing difficulty is, when there is a joint decree against all the defendants for damages in tort, whether one can appeal alone. There is a distinction well known at the common law, between suits founded on the joint contract of the parties defendant, and suits founded upon their tort. In the former, the contract must be proved to be joint, as it is charged; in the latter, it need not. Upon a joint justification in tort, a writ of error lies only by all the parties to the justification; for all are aggrieved if any are. But if they plead severally, and some are acquitted and the others are found guilty, the latter may maintain a writ of error alone, for they alone are aggrieved. In short, the appeal must be joint when the interest is joint; and several where there are distinct and separate interests, represented by independent parties in the same suit.

"In cases of tort, it seems to me that the same rule must by analogy prevail, where

The practice of the courts is settled, where in prize cases an appeal is made and not prosecuted;[1] and doubtless the same rules would apply in other cases. That is, the appellate court may permit the party who appeals to try or argue the case *ex parte*, and then affirm the decree if they see cause; and it is said to be the settled practice of the circuit court in such cases of desertion of appeal, to affirm the decree;[2] or they may remit the cause to the court below for final proceedings, either taxing the costs in the appellate court or directing this to be done in the court below.[3] In the Supreme Court of the United States, it has been held that where an appeal is not prosecuted in that court, it will be dismissed upon a certificate being produced from the circuit court, that the appeal has been taken and not prosecuted.[4] This subject is now provided for by the sixty-third rule of court passed at the December term, 1853, which we give in the Appendix. This rule, which differs but little from the forty-third rule passed in 1835, provides generally that on the failure of the appellant to docket the cause within the time specified, the

the defendants have not a joint interest, and do not, by their pleading, assume a joint defence. In personal trespasses like the present, though the tort should be jointly charged, it is also several in its nature, and one defendant may be found guilty, and the other acquitted. It would seem strange if the decree of the district court should pronounce for a joint trespass and give damages accordingly, that one party should not be entitled to an appeal unless the other would join in it; that one party should not be allowed to establish his innocence upon the appeal, because the other had, by his submission to the decree, admitted his own guilt. Each defendant, in such a case, has a distinct and several interest in the suit. He may answer severally, and a final decree may be entered in his favor. And if he denies the whole charge jointly with the other defendant, by a general answer in the nature of the general issue, he is not thereby deprived of this right to a separate acquittal, if the evidence warrants it. However, if the decree were for joint damages against both defendants, I do not well see how the libellant could maintain a separate appeal against one, for that would be to claim several damages against each. But it would be different as to the defendants; for the charge being in its nature several, as well as joint, one might be aggrieved by the decree, when the other was not, and, therefore, might be entitled to a separate appeal. My opinion is, that, in this case, a several appeal well lies by Thomas from the decree for joint damages, upon the ground that the asserted trespass is several as well as joint; and that Thomas has a distinct and independent interest and responsibility in the suit, unaffected by the decision as to Jordan.

[1] The Privateer Montgomery, 1 Gallis. 416. See The Elizabeth, 1 Hagg. Adm. 226; The San Juan Nepomuceno, id. 265, 267.

[2] The Privateer Montgomery, 1 Gallis. 416.

[3] The Privateer Montgomery, 1 Gallis. 416.

[4] The Jonquille, 6 Wheat. 452.

defendant in error may have it docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was entered, stating the cause and certifying that such writ of error or appeal was duly sued out and allowed. Under these rules it has been decided that the names of the parties must be stated in full, and it is not sufficient to say Holliday *et al. v.* Batson *et al.*[1] The certificate must also state specifically the day of the entry of the judgment or the decree, and it is not enough that the term is given, because the term may not have ended thirty days before the term of the supreme court commenced.[2] The appellee may also file the record of the court below, and move to dismiss the appeal, when the record is not filed by the appellant.[3] The rule of the court in relation to the time in which the appellant must file the record, is peremptory, and "can in no respect depend upon the convenience of the clerks of the inferior courts."[4]

There can be no appeal without security to prosecute the same, and for costs or the like, under the statute in some cases, and as the court may direct in others. But so far as all this is within the discretion of the court, it belongs exclusively to the court below, and the appellate court will not interfere with it.[5]

Whenever an appeal case is heard and decided, and a mandate goes down to the court below to carry the decree into effect, there may be an appeal from that court on the execution of that mandate; because it is necessary that the appellate court should

[1] Holliday *v.* Batson, 4 How. 645; Smith *v.* Clark, 12 How. 21.

[2] Rhodes *v.* Steamship Galveston, 10 How. 144.

[3] United States *v.* Fremont, 18 How. 30.

[4] Sturgess *v.* Harrold, 18 How. 40. The counsel for the appellants in this case applied for an extension of time under the 63d rule, and presented a certificate of the clerk of the circuit court to the effect that he could not consistently with the other duties of his office make out and have ready the transcripts of the records and proceedings within the time specified. The court refused to grant the motion.

[5] Stat. of 1789, ch. 20, § 22; Stat. of 1803, ch. 40, § 2; The Dos Hermanos, 10 Wheat. 306. It was held in this case that if the appeal was prayed for and allowed within five years it was valid, although security was not given until after the lapse of five years, and that the mode of taking the security and the time of perfecting it were within the discretionary power of the court below. But this rule does not apply to a case where the appeal is to operate as a *supersedeas*, for in such a case the appeal bond must be filed within ten days after the rendition of the decree. Adams *v.* Law, 16 How. 144.

have the power of securing the due execution of their decree.[1] But on such appeal, nothing prior to the mandate comes before the appellate court as a question by itself. And, therefore, after a case is sent back to the circuit court, the objection cannot be taken on a second appeal that the court had no jurisdiction to entertain the appeal in the first instance from the circuit court, on the ground that the decree in that court was not a final one.[2] But all the prior proceedings, documents, and evidence, are in the hands of the appellate court, for the purpose of deciding accurately any questions which may arise subsequently to the mandate.[3] If there be a general decree of restitution in the Supreme Court of the United States, no party can set up new claims or new liens in the court below, even if they would have been allowed had they been asserted before the original decree.[4] So if interest be not mentioned in the decree, none will be allowed.[5]

[1] Himely *v.* Rose, 5 Cranch, 313; Boyce *v.* Grundy, 9 Pet. 275. In Sibbald *v.* The United States, 12 Pet. 488, 492, the court said: "The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution, or give any other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded. If the special mandate is not obeyed or executed, then the general power given to 'all the courts of the United States to issue any writs which are necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law;' by the 14th section of the judiciary act; fairly arises, and a mandamus, or other appropriate writ will go." In United States *v.* Fremont, 18 How. 30, an appeal was dismissed on the ground that it was not entered in the supreme court in time, and also on the ground that as the inferior court having taken no action in the case, except to enter the mandate on its records, there was nothing to appeal from.

[2] Washington Bridge Co. *v.* Stewart, 3 How. 413; Whyte *v.* Gibbes, 20 How. 541.

[3] The Santa Maria, 10 Wheat. 431. A decree for general restitution of property had been made in this case. It appeared on the face of the proceedings that the property had been appraised at its value, including the duties to the United States by the claimant, and a stipulation for the amount given. It was held that the decree awarded only the value of the property to the libellant, and that the claimant was entitled to deduct the duties.

[4] The Santa Maria, 10 Wheat. 431.

[5] Himely *v.* Rose, 5 Cranch, 313. The decree of the supreme court in this case said nothing about interest. The property in dispute had been sold, and the court said: "If this money remains in possession of the court, it carries no interest; if it be in the hands of an individual, it may bear interest, or otherwise, as the court shall direct." See also, The Santa Maria, 10 Wheat. 431; Boyce *v.* Grundy, 9 Pet. 275; Hemmenway *v.* Fisher, 20 How. 255.

If a bond be given in the district court conditional to pay or do a certain thing in case of condemnation in that court and there be an appeal to the circuit court and condemnation there, it has the same effect to forfeit the bond.[1]

SECTION V.

OF JURISDICTION IN CASES OF SEIZURES.

The district court is the primary court of revenue, having original jurisdiction in all cases of seizures under the statutes of the United States concerning imposts, navigation, or trade; it may try all questions and entertain all suits, either for the condemnation or acquittal of the property seized: and may decree restoration and compel delivery of the property or of its proceeds or value, into the possession of those whom it finds ultimately to be entitled thereto;[2] and may do this as well by summary decree or decretal order, if the case be already before the court, as upon original proceedings.

It does not derive its jurisdiction from any possession, actual or supposed, of its officers, but from the act and the place of the seizure for the forfeiture; and if it once acquire jurisdiction, it seems that this is not avoided by any subsequent irregularity.[3]

[1] United States *v.* Four Part Pieces of Woollen Cloth, 1 Paine, C. C. 435. See also, United States *v.* Schooner Little Charles, 1 Brock. C. C. 380.

[2] The Abby, 1 Mason, 360.

[3] Sch. Bolina and Cargo, 1 Gallis. 75. On page 81, *Story*, J., said: "In the admiralty, in all proceedings *in rem*, the court has a right to order the thing to be taken into the custody of the law, and it is presumed to be in the custody of the law, unless the contrary appears; and when once a vessel is libelled, then she is considered as in the custody of the law, and at the disposal of the court; and monitions may be issued to persons having the actual custody, to obey the injunctions of the court. The jurisdiction of the admiralty, however, is not founded on that circumstance."

And on page 83, "The District Court of the United States derives its jurisdiction, not from any supposed possession of its officers, but from the act and place of seizure for the forfeiture. Act, 24th September, 1789, ch. 20. And when once it has acquired a regular jurisdiction, I do not perceive how any subsequent irregularity would avoid it. It may render the ultimate decree ineffectual in certain events, but the regular results of the adjudication must remain. I do not apprehend that an accidental de-

The court of the district in which the seizure is first made (without regard to the place where the forfeiture occurs), has exclusive original cognizance of it;[1] and if the property be carried into another district, the circuit court will remand the property to the district in which it was originally seized.[2] But if the seizure be made upon the high seas,[3] or within the territory of a foreign power,[4] that court has cognizance of it, into which court, or the district of which court, it is finally carried. If the seizure is on land, the court proceeds as a court of common law, with a jury, and the general course of the English Exchequer upon informations *in rem* is followed.[5]

These two jurisdictions, admiralty and common law, though vested in one court, are perfectly distinct and independent, and cannot be blended together.[6] But if the seizures be upon waters,

struction by fire, would prevent the court from protecting its officers from prosecution by pronouncing, if just, a regular condemnation."

In the case of Jennings *v.* Carson, 4 Cranch, 2, the principles of admiralty law, as to the jurisdiction of the court over the property, were fully laid down by Marshall, C. J. The privateer Addition, cruising under a commission during the war with Great Britain, captured the Sloop George and libelled her in the court of admiralty for New Jersey, where she was condemned and decreed to be sold. The claimant, Jennings, appealed, and the decree was reversed by the circuit court. Pending the appeal the vessel was sold; and Jennings brought a suit against the captors as wrongdoers. The court held, that the moment a vessel was libelled, it was in the custody of the law, not of the captors, and that the court of admiralty, having possession of the property, had an undoubted right to sell it for the benefit of the parties. The law on these two points, was ably examined under the principles then acknowledged (1807), and the conclusions there laid down appear to be now well settled.

In regard to the question of irregularity in the record and in the manner of sale, the court said, in Jennings *v.* Carson, "At any rate, the court of admiralty must be supposed to have done its duty, and to have been in possession of the thing in contest, if its duty required that possession. The George and her cargo, therefore, must be considered as being in custody of the law, unless the contrary appears. If this conclusion be right, it follows that the regularity of the sale, is a question of no importance to the defendants, since that sale was the act of a court having legal possession of the thing, and acting on its own authority."

[1] Keene *v.* United States, 5 Cranch, 304.

[2] The Abby, 1 Mason, 360, per *Story*, J.

[3] The Abby, 1 Mason, 360.

[4] The ship Richmond *v.* United States, 9 Cranch, 102; The Merino, 9 Wheat. 391.

[5] United States *v.* Fourteen Packages of Pins, Gilpin, 235; 651 Chests of Tea *v.* United States, 1 Paine, C. C. 499, 504; The Sarah, 8 Wheat. 391.

[6] In The Sarah, 8 Wheat. 391, *Marshall*, C. J., after stating the case, proceeded as follows: "By the act constituting the judicial system of the United States, the district courts are courts both of common law and admiralty jurisdiction. In the trial of

navigable from the sea by vessels of ten or more tons burden, this court had admiralty jurisdiction by the statute by libel without jury.[1]

all cases of seizure on land, the court sits as a court of common law. In cases of seizure made on waters navigable by vessels of ten tons burden and upwards, the court sits as a court of admiralty. In all cases at common law, the trial must be by jury. In cases of admiralty and maritime jurisdiction, it has been settled in the cases of United States *v.* La Vengeance, 3 Dall. 297; United States *v.* Sch. Sally, 2 Cranch, 406; and United States *v.* The Betsey and Charlotte, 4 Cranch, 443; that the trial is to be by the court. Although the two jurisdictions are vested in the same tribunal, they are as distinct from each other as if they were vested in different tribunals, and can no more be blended, than a court of chancery with a court of common law. The court for the Louisiana district was sitting as a court of admiralty; and when it was shown that the seizure was made on land, its jurisdiction ceased. The libel ought to have been dismissed, or amended by charging that the seizure was made on land. The direction of a jury in a case where the libel charged a seizure on water was irregular; and any proceeding of the court, as a court of admiralty, after the fact that the seizure was made on land appeared, would have been a proceeding without jurisdiction. The court felt some disposition to consider this empanelling of a jury at the instance of the claimants, as amounting to a consent that the libel should stand amended; but on reflection, that idea was rejected. If this is considered as a case at common law, it would be necessary to dismiss this appeal; because the judgment could not be brought before this court but by writ of error. If it is considered as a case of admiralty jurisdiction, the sentence ought to be reversed, because it could not be pronounced by a court of admiralty, on a seizure made on land. As the libel charges a seizure on water, it is thought most advisable to reverse all the proceedings to the libel, and to remand the cause to the district court for farther proceedings, with directions to permit the libel to be amended."

In 1828, the same case came on to be heard again, under the name of United States *v.* 422 Casks of Wine, 1 Pet. 547, judgment having been rendered in the court below in favor of the claimants. The appeal was made, on the ground that the original claimants, Hazard & Williams, were not the real owners of the wine under seizure. The court held, that it was too late for this ground to be taken, because it should have been taken before the trial in the court below. The court said: "The objection is founded upon a mistaken view of the time, nature, and order of the proceedings proper in suits *in rem*, whether arising on the admiralty or exchequer side of the court. In such suits, the claimant is an actor and entitled to come before the court in that character only, in virtue of his proprietary interest in the thing in controversy; this alone gives him a *persona standi in judicio*. It is necessary that he should establish his right to that character, as a preliminary to his admission as a party *ad litem*, capable of sustaining the litigation. He is, therefore, in the regular and proper course of practice, required, in the first instance, to put in his claim upon oath, averring in positive terms, his proprietary interest. If he refuses so to do, it is a sufficient reason for a rejection of his claim. If the claim be made through the intervention of an agent, the agent is, in like manner, required to make oath to his belief of the verity of the claim, and, if necessary, he may also be required to produce and prove his authority, before he can be admitted to put in the claim. If this is not done, it furnishes matter of exception, and may be insisted upon by the adverse party, for the dismissal of the claim. If

[1] The Margaret, 9 Wheat. 421.

If the libel charge the seizure as having been made on the *water*, when in fact it was made on the *land*, it is bad and must be either amended or dismissed.[1]

The district court has, however, no jurisdiction to enforce a lien for duties, by information in admiralty; because its revenue jurisdiction, by procedure *in rem*, extends only to seizures for *forfeitures* under the laws of impost, navigation, or trade. But an action at common law may be instituted, by the United States and in their name, in the district or in the circuit court, to recover possession of goods if they have a legal lien on them, or to recover damages for the illegal taking or detaining them.[2]

We have spoken hitherto only of the courts which have

the claim be admitted upon this preliminary proof, it is still open to contestation, and, by a suitable exceptive allegation in the admiralty, or by a correspondent plea in the nature of a plea in abatement to the person of the claimant, in the exchequer, the facts of proprietary interest sufficient to support the claim, may be put in contestation and formally decided. It is in this stage of the proceedings, and in this only, that the question of the claimant's right is generally open for discussion. If the claim is admitted without objection, and allegations or pleadings to the merits are subsequently put in, it is a waiver of the preliminary inquiry, and an admission that the party is rightly in court and capable of contesting the merits." But when, after the merits have been passed upon, it appears that the rights of some third person have been wrongfully invaded, it is a matter for the consideration of the court, but, in no shape, a matter which the original *promovent* could require at its hands.

[1] The Sarah, 8 Wheat. 391.

[2] United States *v.* 350 Chests of Tea, 12 Wheat. 486. In this case, a libel was filed against 350 chests of tea, for the purpose of compelling the payment of the duties thereon. The teas had been landed and stored, and fraudulently and secretly taken from the store-house. The court decided that the duties having been "secured to be paid," according to the statute, they were not now due, and proceeded, p. 497, "By the 9th section of the judiciary act, the district courts have exclusive original cognizance," etc. (giving the substance of the section), "Now it is not pretended that this is a civil cause of admiralty and maritime jurisdiction; and it has already been shown, that there is no law of the United States, of impost or otherwise, to warrant the seizure of the teas in question, or to subject them to forfeiture. But even if there were such a law, the only proceeding which could have been instituted under it, must have been to forfeit the articles seized, and not to subject them to the payment of duties. If the case be not one of forfeiture, we can perceive no ground upon which the district court could entertain a suit by way of libel to enforce the payment of duties. No jurisdiction is conferred upon that court in such a case, either by the above section of the judiciary act, or by any other act of congress. There is no doubt but that a suit at common law might be instituted in that court as well as in the circuit court, in the name of the United States, founded upon their legal right to recover the possession of goods upon which they have a lien for duties, or damages for the illegal taking or detaining of the same. But the remedy which has been selected is not one which can obtain the sanction of this court."

admiralty jurisdiction within the United States; and it is certain that no courts can have this jurisdiction in the States, but those which are established by congress in pursuance of and in conformity with the third article of the constitution of the United States. But it is held that this limitation does not extend in this respect, at least, to the Territories; because congress legislates for them with the combined powers of the State and general governments. An act of a Territory created a court with authority to take jurisdiction of a case of salvage; and in such a case which came before it, a decree of sale for salvage of a cargo which had been stranded and brought within its territorial limits, was made by the territorial court, and sustained by the supreme court, and a sale made under it was held to be valid and to have changed the property.[1]

[1] American Ins. Co. *v.* 356 Bales of Cotton, 1 Pet. 511, was as follows: The insurance company libelled 356 bales of cotton, in the South Carolina district, demanding restitution thereof, on the ground that the property had been abandoned to them by the owners. Canter, the claimant, claimed on the ground that they had been sold to him, by virtue of an order of a territorial court of Florida, consisting of a notary and five jurors, to pay salvage assessed by them at 76 per cent. The district judge pronounced this decree a nullity, and ordered the restoration of the cotton, subject to 50 per cent. salvage. The circuit court decreed the whole cotton to the claimant, on the ground that the proceedings of the court at Key West were legal, and transferred the property. The opinion of Chief Justice *Marshall* is a model of acute and accurate reasoning. The substance of it, although it is difficult to condense that which is already so compact, may be stated thus: —

The laws of Florida which had reference to the relations of the people to each other while under their Spanish sovereign, are in force after their annexation to this country, except where changed by congress, which has the power, under the constitution, of regulating and governing the Territories. The Act of Congress of 1823, provided for a territorial legislature, and this territorial legislature created the court which rendered the above decree. The same act provided two superior courts, to which it gave exclusive jurisdiction in criminal matters, and *some* civil matters. All civil matters were either under the preëxisting laws of the Territory, or under the laws in which this exclusive jurisdiction was given to the superior courts. This jurisdiction was to be coextensive with that conferred on the courts of the United States by the Judiciary Acts of 1789 and 1793. Admiralty and maritime cases are not such as were given exclusively to the superior courts; for to these courts was given exclusive jurisdiction of only such cases as arose "under the laws of the United States" and capital cases; and the constitution expressly makes a distinction, when, by Art. III. it gives the United States courts cognizance of three distinct classes of cases. Salvage is a case of admiralty and maritime jurisdiction, and as it was undoubtedly provided for under the preëxisting laws of the Territory, is cognizable concurrently by the superior courts created by the act, and by the inferior court created by the territorial council.

But it is argued that the constitution requires that the judicial power of the United States shall be vested in "one supreme court, and in such inferior courts as congress

may from time to time establish," and that congress cannot vest admiralty jurisdiction in courts created by a territorial legislature.

To this it is answered that the very next sentence of the constitution declares, that "the judges both of the supreme and the inferior courts shall hold their offices during good behavior." The judges of the superior court of Florida hold their offices for the term of four years. These courts, then, are not constitutional courts, in which the judicial power conferred by the general government can be deposited. They are incapable of receiving it. They are legislative courts, created by virtue of that clause which enables congress to make all needful rules and regulations respecting the territories belonging to the United States. The people of Florida, though admitted to enjoy the privileges, rights, and immunities of the people of the United States, do not share in their political power, and cannot until Florida becomes a State. The courts referred to by the constitution, were meant for the States, and were a part of the *federal* system of government by which States having individual rights were bound together. But a Territory is not a State, and was not so considered by the framers of the constitution.

The jurisdiction, then, with which these superior courts of Florida are invested, is not a part of that judicial power which is defined by the third article of the constitution, but is conferred by congress in execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the *States*, in those courts only which are established in pursuance of the third article of the constitution, the same limitation does not extend to the territories. The act of the territorial legislature erecting the court by whose decree the cargo of the Point á Petre was sold, is valid; and a sale in pursuance of that decree changed the property.

CHAPTER III.

OF FOREIGN COURTS OF ADMIRALTY.

THE general subject of admiralty jurisdiction is commerce; for even its revenue and its military jurisdiction relate mainly to commercial matters. These are at home on the ocean, and as they make it a highway from country to country, instead of a barrier between them, they may be said to connect nations into some measure of fellowship and unity; and this, it may be believed, will grow with the advancing civilization of mankind. It might therefore be expected that courts, which deal with these subjects of universal interest, should not only be governed by similar principles in different nations and adopt similar forms, but that they should exercise a kind of common jurisdiction. They sometimes enforce each other's decrees, or complete in one country what is done in another. And frequently the citizens of one nation sue in the admiralty courts of another, and when comity demands it, their petitions will be heard and their causes determined.

In England, in an early case on this subject, an American vessel which had been captured, was recaptured by her crew and taken to England. Some of the crew who were English subjects and had shipped on the voyage to England with no intention of returning to America, libelled the ship for salvage, and the court entertained jurisdiction of the case. And subsequently four American seamen petitioned for reward for their services in the rescue and it was allowed them.[1]

In all matters which properly belong to the *jus gentium*, and where justice requires that the court should act, it will do so; as

[1] The Two Friends, 1 Rob. Adm. 271, 276. See also, The Good Intent, cited 1 Rob. Adm. 286, where an American vessel was recaptured from the French by an American armed ship, and there being no opposition to the jurisdiction of the court, salvage was allowed.

in case of bottomry bonds.[1] In respect to seamen's wages, as a general rule the court will take jurisdiction, if the suit is commenced with the consent of the representative of the country to which the ship belongs.[2] And in some cases where this consent cannot be obtained, the court will proceed without it.[3] It seems, however, that the consent of the foreign minister is essential, not in respect to the jurisdiction of the court, but merely as to the exercise of its discretion.[4] But it is unwilling to enforce a mere municipal law of a foreign country, although it has jurisdiction of the subject-matter.[5] It is for this reason, that the court will

[1] The Gratitudine, 3 Rob. Adm. 240; The Jacob, 4 id. 245; The Madonna D'Idra, 1 Dods. 37.

[2] The Courtney, Edw. Adm. 239; The Madonna D'Idra, 1 Dods. 37.

[3] The Vrow Mina, 1 Dods. 234. In this case, a ship which belonged to an alien enemy, came to England under a British license, and was libelled for wages. The court entertained the suit, and stated that as the consent of the accredited minister could not be obtained, it would not be required. The same point was decided in The Maria Theresa, 1 Dods. 303, and the further reason was added, that the courts of the country to which the ship belonged, would not grant relief on account of the illegality of the voyage.

[4] The Golubchick, 1 W. Rob. 143. The vessel in this case belonged to Russia, and was libelled for wages. The master appeared under protest, stating that the suit had been commenced without the consent of the Russian consul, or any other accredited agent of that government in the country. Dr. *Lushington* held, that "the court must possess original jurisdiction over the subject-matter, or it can have none at all; for the consent of a foreign consul or minister never could confer a jurisdiction upon a British court of judicature." The learned judge, however, said that he wished "it to be understood, that in all future cases of this kind, it must be held to be indispensable, that notice of the intended proceedings should be given in the first instance, to the representative of the foreign government. In so directing, I do not mean to intimate that the court would feel imperatively bound to act in accordance with the views that might be entertained by such representative; but I consider it is expedient that such intimation should be given, in order that, if any objection should be taken against the prosecution of the proceedings in this court, the court being informed of the grounds upon which such objection is taken, might be enabled to form its own judgment of the sufficiency of such objection, and adopt such a course as may be most conducive to the furtherance of justice in the cause."

[5] The Courtney, Edw. Adm. 239. In this case, the statute of the United States was printed on the back of the shipping articles, requiring the master, in case of the discharge of the seamen in a foreign port, to pay to the American consul three months' wages over and above their wages then due, two thirds of which were to go to the seaman and one third to the treasury of the United States. The court entertained the suit for wages under the shipping articles, but refused to enforce the provisions of this statute. In The Madonna D'Idra, 1 Dods. 37, a claim was made by some Greek sailors, who had shipped at Smyrna for London, for their wages, and also, for an allowance for their subsistence until they could return to their country. There was evidence that by the customary regulations of Turkey, it was the duty of a master to take his

not generally take jurisdiction of possessory suits between foreigners.[1] Stipulations in the shipping articles, that no suit should be brought, except in the port of the country to which the ship belonged, would undoubtedly be enforced in England, but the admiralty court would take jurisdiction if the voyage were broken up and abandoned in England.[2]

In this country, it seems to be settled after some controversy, that our admiralty courts have full jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature. It is, however, a question of discretion in every case, and the court will not take cognizance of the cause,

crew back in his own vessel, or to find conveyance for them in another vessel, and that in case of the sale, the proceeds were liable for the support of the crew and to procure them the means of conveyance to their own country. A sufficient sum for the subsistence of the crew was accordingly allowed, in addition to their wages. The court, after referring to the custom above cited, said: "This, I think, effectually distinguishes the present case from the American cases which were lately before the court. The American seamen did not there attempt to establish their right, as due to them by the universal usage and custom of their country, or as forming part of the contract under which they sailed, but upon the ground of a statute lately introduced. As the demand was made upon a mere legislative act of that country, the court declined to interfere, but it held there, that if the subject-matter in dispute between the parties had formed part of the contract, it would have upheld the demand."

[1] The Johan and Siegmund, Edw. Adm. 242. The vessel in this case, belonged to Hamburg. The suit was brought by the owners of fifteen sixteenths to recover possession of the vessel from the master, who owned one sixteenth. Sir *William Scott* said: "The court, with the consent of the parties and of the accredited agent of the country to which they belong, certainly does hold plea of causes between foreigners, arising on the *jus gentium*; but this, I think, is a case which cannot be so considered, because, whatever may have been the general rule under the old civil law in cases of possession, it has been variously modified by the municipal law of different countries; and therefore, by entertaining this suit I might deprive the parties of those rights, to which they are entitled by the law of their own country, as administered in those courts to which they are directly and properly amenable." See also, The Martin of Norfolk, 4 Rob. Adm. 293. In The See Reuter, 1 Dods. 22, the same learned judge said: "The court, therefore, is very unwilling to enter upon such questions; and has never, I believe, entertained suits of this kind, unless the cases have been referred to its decision by the consent of parties or by the intervention of the representative of the foreign state devolving the jurisdiction of his own country on this court." In this case, however, there being an order of the court, exercising admiralty powers in the country to which the ship belonged, decreeing that the master should give up the vessel, the court enforced the decree.

[2] The Wilhelm Frederick, 1 Hagg. Adm. 138. The same rule has been adopted by the common law courts, where the seaman is wrongfully discharged in a foreign country, Sigard *v.* Roberts, 3 Esp. 71; or compelled by cruelty to leave the vessel, Limland *v.* Stephens, 3 Esp. 269.

if justice would be as well done by remitting the parties to their home forum. In one of the most elaborately considered cases on this subject, jurisdiction was exercised in the case of a bottomry bond, although the contract was made between subjects of the Sublime Porte, and it did not appear that it was intended that the vessel should come to the United States.[1] Claims for salvage which depend for their determination upon the law of nations, will generally be considered by our courts.[2] It is, however, in cases of seamen's wages that the power of the courts is most frequently invoked, and it is well settled that cognizance of a suit will be taken whenever justice demands that it should be done;[3] as where the voyage is broken up at a port of this

[1] The Jerusalem, 2 Gallis. 191. See also, The Aurora, 1 Wheat. 96.

[2] The Bee, Ware, 332. In the case of One Hundred and Ninety-four Shawls, Abbott, Adm. 317, which was a case of salvage of English goods by an English ship, Mr. Justice *Betts* held, that although the court had jurisdiction, yet that the exercise of a sound discretion required him to dismiss the prosecution and to remit the property and cause to the proper forum in Great Britain. The learned judge stated, that when the only question was as to the rate of reward, the court would be solicitous to give every practicable despatch to the suit. The reasons for dismissing the suit were, that the owner, in his answer, charged embezzlement and spoliation of the property; that the provisions of the English statute relating to salvage could be best adjudicated upon in England; that the vessel in which the goods originally were, had been the subject of salvage and had been taken to England by other salvors, and that all the questions relative to the salvage service could be best determined together; that the vessel to which the salvors belonged, was on a voyage to England at the time the service was rendered; and, that the articles saved were especially adapted to the English market, and were transshipped from a vessel bound to London and near that port, and the court doubted whether such conduct, if excusable in law, gave a claim to remuneration as for a meritorious salvage.

[3] The Ada, Davois, 407. The law on this subject is ably stated in the celebrated case of Taylor *v.* Carryl, 20 How. 583, 611, by the learned Chief Justice of the Supreme Court of the United States. "It is true, that it is not in every case obligatory upon our courts of admiralty to enforce it in the case of foreign ships, and the right or duty of doing so, is sometimes regulated with particular nations, by treaty. But as a general rule, where there is no treaty regulation, and no law of congress to the contrary, the admiralty courts have always enforced the lien, where it was given by the State or nation to which the vessel belonged. In this respect, the admiralty courts act as international courts, and enforce the lien upon principles of comity. There may be, and sometimes have been, cases in which the court, under special circumstances, has refused to interfere between the foreign seamen and ship-owner; but that is always a question of sound judicial discretion, and does not affect the jurisdiction of the court." It should be remarked, that although this citation is taken from a dissenting opinion, yet the decision of the court proceeded on another ground, and this doctrine was not doubted.

In Ellison *v.* Ship Bellona, Bee, 112, the court said: "Courts of admiralty have a

country,[1] or the seaman is compelled to desert on account of cruel treatment,[2] or is entitled to be discharged on account of a deviation.[3]

It seems to be questioned, whether a foreign seaman is entitled to sue in this country, if discharged here by his own wish, or with his consent.[4] But it is very clear, that he is not, if he leaves the vessel of his own accord before the voyage is finished, and when he could return to his own country.[5] And our courts,

general jurisdiction in causes, civil and maritime. The case of seamen's wages comes within the description of causes; and this jurisdiction has been uniformly exercised by me, as regards foreigners generally." In this case, the court took jurisdiction in a suit for wages against a foreign vessel having letters of marque. It was, however, said that no action could be brought in a foreign country against a ship of war, because the seamen look to the government of the country by whom they are employed. Nor, it is said, would an action lie against a privateer, because the share of prize is settled between the owners and crew, and before the seamen are entitled to any prize money, the validity of the prize must be determined by the proper courts of the nation to which the captors belong.

[1] In Clark *v.* Sch. Gazelle, March, 1858; in The Bark Havana, April, 1858, 22 Law Reporter, 150; and in Peake *v.* Bark Havana, November, 1857, all in the District Court for the Massachusetts District, Mr. Justice *Sprague* held, that where a foreign vessel was attached and sold by State process for an ordinary debt of the owners, and the voyage was thus broken up, the seamen might sue in admiralty for their wages.

[2] Weiberg *v.* Brig St. Oloff. 2 Pet. Adm. 428.

[3] Weiberg *v.* Brig St. Oloff, 2 Pet. Adm. 428. There was also, cruel treatment in this case. The same point, as to the question of the effect of a deviation, was decided in the case of Moran *v.* Baudin, 2 Pet. Adm. 415. But in Bucker *v.* Klorkgeter, Abbott, Adm. 402, 409, there is a dictum of Mr. Justice *Betts*, that he would not take cognizance of a case where the seaman claimed his discharge solely on the ground of a deviation. In Jansen *v.* The Heinrich, Crabbe, 226, where the seamen were held entitled to leave the vessel, because they had not signed shipping articles, no question was made as to the jurisdiction of the court.

[4] It was held in The Infanta, Abbott, Adm. 263, that the court would not take jurisdiction in such a case. See also, Graham *v.* Hoskins, Olcott, Adm. 224. In The Brig Napoleon, Olcott, Adm. 208, the libellant was an American citizen, and the case is not, therefore, contrary to those above cited, though the language of the court appears to conflict. But in Johnson *v.* Dalton, 1 Cow. 543, the Supreme Court of New York took cognizance of a marine tort, on the sole ground that the libellant had been legally discharged, though the voyage was not ended. And in Pugh *v.* Gillam, 1 Calif. 485, where the plaintiff, a British subject, shipped on time and was discharged by the master, seven days before the time expired, because the vessel was about to sail on a long voyage, it was held, that he could sue in our courts, though the vessel and captain were English.

[5] Gonzales *v.* Minor, 2 Wallace, C. C. 348; Thomson *v.* Ship Nanny, Bee, 217; Willendson *v.* The Försöket, 1 Pet. Adm. 197; Henry *v.* Curry, Abbott, Adm. 433; The Pacific, Blatchf. & H. Adm. 187. In Gardner *v.* Thomas, 14 Johns. 134, the supreme court refused to entertain a suit, where it did not appear but that the parties

if necessary, will enforce the provisions of a foreign statute,[1] though, if possible, they prefer in such a case to remit the parties to their home forum.[2] The same rule prevails in this country as in England, respecting stipulations in the shipping articles preventing the seamen from suing, save in the home port. They have no application, if the voyage is broken up in a foreign country.[3] Our courts, it would seem, go somewhat farther than the English courts in requiring the assent of the minister or consul of the foreign country to which the parties belong;[4] and some re-

intended to return to their own country at the termination of the voyage. In Lynch *v.* Crowder, U. S. D. C., New York, 12 Law Reporter, 355, the seamen shipped in England to a port in this country, and thence to a port of discharge in the United Kingdom. The master assented to their leaving in this country, but afterwards withdrew his assent, and the dissent of the British consul to the suit was also filed. Under these circumstances, Mr. Justice *Betts* refused to allow the case to proceed, but held that as the master had given his unreserved consent to their discharge, and there was no proof that he had withdrawn it before costs were incurred, the respondents should pay summary costs.

[1] The Bark Havana, U. S. D. C., Mass., 22 Law Reporter, 150. The court, in this case, enforced the lien of the master for wages, under the provisions of an English statute. So, in Davis *v.* Leslie, Abbott, Adm. 123, the provisions of the English statute were enforced, which give a lien in case of shipwreck, provided the seamen use their utmost endeavors to save the vessel.

[2] One Hundred and Ninety-four Shawls, Abbott, Adm. 317.

[3] Bucker *v.* Klorkgeter, Abbott, Adm. 402. The case of Aertsen *v.* Ship Aurora, Bee, 161, which is sometimes cited to the point, that the court will in no case interfere, where the shipping articles stipulate that all disputes shall be regulated according to the law of the country to which the vessel belongs, was decided on the ground, that the libellant had made out no case for relief.

[4] In Davis *v.* Leslie, Abbott, Adm. 123, 134, after stating the English rule, Mr. Justice *Betts* said: "But in the courts of the United States, this precautionary condition is not required; and jurisdiction will ordinarily be exercised, if the voyage has been terminated by full completion or abandonment, or if the contract of hiring is dissolved by the wrongful act of the owner or master." But in The Infanta, decided in April of the same year, Abbott, Adm. 263, 268, the same learned judge said: "It is expected that a foreign seaman seeking to prosecute an action of this description in the courts of this country, will procure the official sanction of the commercial or political representative of the country to which he belongs; or that good reason will be shown for allowing his suit, in the absence of such approval." The language of Mr. Justice *Grier*, in Gonzales *v.* Minor, 2 Wallace, C. C. 348, is much to the same effect. Without deciding whether the court would hear any case which was prosecuted without the consent of the consul, the learned judge said: "But when the court *does* entertain such cases without the request of the representative of the government, they will require the libellants to exhibit such a case of peculiar hardship, injustice, or injury, likely to be suffered without such interference, as would raise the presumption of a request, because it is in fact, conferring a favor on such foreign State." And in Hay *v.* Brig Bloomer, U. S. D. C., Mass., March, 1859, *Sprague*, J., said: "The usual course in the case of

cognition on their part, of the court, is usually required. Their assent cannot have any thing to do with the question of jurisdiction, for the reasons that we have already stated, but it becomes essential in another point of view. For the court is not obliged to take jurisdiction in any suit between foreigners, and does so for one of two reasons, either to protect its own citizens, as where foreigners are discharged upon our shores, or on account of the comity of nations. In this latter case, the consent of the accredited minister of the foreign country is of importance. If he expressly signifies his dissent, this is equivalent to an avowal on the part of the foreign government, that they have no desire that our courts should exercise jurisdiction, and of course, no principles of comity require it. And a statute expressly providing that, except in certain cases, seamen shall not sue in a foreign country, would have the same effect.[1]

In one case, the libellant, an American citizen, had been hired in Boston for a voyage in an English registered vessel with an English master, from Boston to St. Jago and back to a port in the United States. The voyage was performed and the crew discharged in Boston. An action was commenced in a cause of personal damage, and the English consul filed a protest to the jurisdiction of the court, setting forth that the vessel was a British vessel, and the commander a British subject. Also, "that an investigation of some of the alleged causes of damage must call in question official acts and conduct of a British functionary in regard to British subjects, for which he is responsible only to his own government." Mr. Justice *Curtis* overruled the protest, and, on the merits, affirmed a decree in favor of the libellant.[2]

a libel by a foreign seaman against his vessel, is to direct the clerk to inform the consul of the government of the pendency of the suit, that he may take such notice of it as he thinks proper; and, unless there were strong circumstances in the case, the court would not proceed *in rem* against a foreign vessel, without the assent of the commercial representative here of the foreign government of the country where she belonged.' See also, Lynch *v.* Crowder, U. S. D. C., New York, 12 Law Reporter, 355. In The Bark Havana, U. S. D. C., Mass., 22 Law Reporter, 150, as the accounts depended somewhat upon English law and usages, the aid of the British consul, as assessor, was invoked.

[1] Hay *v.* Brig Bloomer, U. S. D. C., Mass., March, 1859. The court seem to rely in this case, on the statutes of the 7th & 8th of Victoria, c. 112, in 1844, and the 13th & 14th Victoria, c. 93, § 94, in 1850. No notice seems to have been taken of the 17th & 18th Victoria, c. 104, § 190.

[2] Patch *v.* Marshall, 1 Curtis, C. C. 452.

CHAPTER IV.

OF THE JURISDICTION OF THE ADMIRALTY OVER PROCEEDS IN THE REGISTRY.

WHEN a vessel or other property against which a suit is brought, is sold, and the proceeds brought into the registry, the power of the court to distribute these proceeds is unquestioned, but the right of the court to decree that third persons who could not have proceeded against the property *in rem*, may receive a proportion of the proceeds of that property to satisfy their claims against the owner, does not seem to us to be clearly settled on principle if it is on authority, and the growth of the power of the admiralty courts, in this particular, is to be attributed to a desire, on their part, to mitigate the hardships imposed on material-men by the jealousy of the common-law courts.

Thus, in England, prior to the passage of a late statute, material-men could not enforce their lien against the vessel in admiralty; but at one time they were permitted to receive on their petition the amount due to them from the surplus proceeds in the registry.[1] The power of the court to decree payment out of the proceeds in such a case, when the payment was opposed by the owners, was soon afterwards denied.[2] And although the authority of this case was denied, and the old rule maintained

[1] See cases cited 3 Hagg. Adm. 148, note. In most, if not in all of these cases, however, no appearance was made in behalf of the owners. In The John, 3 Rob. Adm. 288, the court decreed, in the case of a foreign ship, that a material-man might have payment of the proceeds in the registry, but denied the right to a general creditor of the owners, on the ground that the nature of the accounts rendered his demand more fit for a court of chancery. The court said: "The court of admiralty would not attempt to interfere where the demand itself is the subject of a dispute, which the powers of a court of equity are alone competent to settle."

[2] The Maitland, 2 Hagg. Adm. 253.

by Sir *John Nicholl*, a short time afterwards,[1] yet his decision was reversed by the privy council, on the ground that there was no difference between the right of action against proceeds, and that against the thing itself, where the claim is opposed by the owner, or by a person claiming under him, as a mortgagee in possession.[2] And a mortgagee, not in possession, has also been denied a share of the proceeds.[3] But where a vessel which had been seized by the sheriff on execution, was taken by the officers of the court of admiralty, and sold by order of that court, and the sheriff petitioned that the balance of the proceeds after the judgment in the admiralty court had been satisfied, should be paid over to him, the privy council, on appeal, decreed that it should be done in preference to paying the balance to the owner.[4]

In this country a more liberal policy has been pursued, and the general principle has been laid down, that where proceeds are rightfully in the possession and custody of the admiralty, "it is an inherent incident to the jurisdiction of that court to entertain supplemental suits by the parties in interest, to ascertain to whom those proceeds rightfully belong, and to deliver them over to the parties who establish the lawful ownership thereof."[5] It is not, however, to be understood that in this country the general creditors of the owner may, by petition, claim the proceeds in the registry, but the right is limited generally, at least, to those

[1] The Neptune, 3 Hagg. Adm. 129.

[2] The Neptune, 3 Knapp, P. C. Cas. 94. This decision was followed in the case of The New Eagle, 2 W. Rob. 441, where the court refused the petition of one who alleged that he had advanced a sum of money for the service of the vessel in the payment of seamen's wages, etc., and ordered the proceeds to be paid to the mortgagees. Dr. *Lushington*, referring to the case of The Neptune, said: "After that decision, it is impossible to make a distinction between the proceeds and the ship itself."

[3] The Portsea, 2 Hagg. Adm. 84; The Exmouth, id. 88, note.

[4] The Flora, 1 Hagg. Adm. 298. This case is generally cited as an authority to the point, that a judgment debt in a common-law court, may be proved against the proceeds in admiralty. And the authority for this inference is the remark of the court that, "although the court of admiralty cannot enter into the contracts of general creditors, yet it may be bound to take a judgment on record as a debt." The decision seems, however, to have rested mainly on the ground that the right of the sheriff against the proceeds, on an attachment, was not lost by a sale under the admiralty court, their judgment being satisfied.

[5] Andrews *v.* Wall, 3 How. 568, 573, per *Story*, J.

whose debt "is either of itself, or in its origin a lien on the ship, or other thing out of which the moneys were produced."[1]

Where the lien is waived by intendment of law,[2] or is lost by a neglect to enforce it within the proper time,[3] it has been held that the claim may be enforced against the proceeds. But some courts have gone farther, and it has been held that after the liens are all satisfied out of the proceeds of the sale, the surplus funds remaining in court are subject as against the owner to the claim of the master, although he can only sue *in personam*, for wages.[4] And in another case, a stevedore, who, we have seen, cannot sue either *in personam* or *in rem*,[5] was allowed to have his claim paid out of the proceeds after all other claims were satisfied.[6] It has also been held that the admiralty will take jurisdiction in matters of account between part-owners in respect to the surplus proceeds;[7] but this doctrine, we think, is not supported on principle or on authority.

No distinction seems to be made in this country between the right of a mortgagee in possession, and one who is out of possession, but the proceeds are given to either in preference to the owner or a general creditor, on the ground that the mortgagee has a lien at law.[8]

A surety on a bond or stipulation in admiralty, who has paid the money in accordance with the decree of the court, stands in the place of the original debtor, and is entitled to the proceeds after the claims for which the vessel was libelled are paid. But his right is no greater than that of the original debtor, and his

[1] Gardner *v.* The Ship New Jersey, 1 Pet. Adm. 223, 226.

[2] Zane *v.* The Brig President, 4 Wash. C. C. 453. See also, The Boston, Blatchf. & H. Adm. 309, 328.

[3] The Stephen Allen, Blatchf. & H. Adm. 175.

[4] The Santa Anna, Blatchf. & H. Adm. 79.

[5] See ante, Vol. I. p. 489.

[6] Emerson *v.* Proceeds of The Pandora, 1 Newb. Adm. 438. But in the case of The Ship Panama, Olcott, Adm. 343, where the owner of the vessel claimed the right to the proceeds against the mortgagee and had paid the claim of a stevedore, it was held that he could not deduct the amount from the proceeds due the mortgagee.

[7] The L. B. Goldsmith, 1 Newb. Adm. 123.

[8] Harper *v.* The New Brig, Gilpin, 536; Leland *v.* Ship Medora, 2 Woodb. & M. 92; The Ship Panama, Olcott, Adm. 343; Remnants in Court, id. 382. The right of a lien creditor is, however, preferred to that of a mortgagee. Justi Pon *v.* The Proceeds of the Brig Arbustci, U. S. D. C., New York, 6 Am. Law Register, 511.

claim to the proceeds is postponed to creditors who have liens on the property.[1]

And where a sum of money in court has been decreed to be paid to a libellant, the court will not, on application of a creditor, appropriate it to a debt due by the libellant.[2]

[1] Carroll *v.* The T. P. Leathers, 1 Newb. Adm. 432.
[2] Brackett *v.* The Hercules, Gilpin, 184.

CHAPTER V.

OF THE PRINCIPLES OF ADMIRALTY JURISPRUDENCE.

We shall endeavor to treat of these in connection with the several topics which we have before enumerated. We divided them into three classes; the first of which consisted of those suits in admiralty which arise from private and civil claims, grounded on maritime contracts, either express or implied, or on maritime torts or trespass. The list of these is long; because it enumerates nearly or quite all the topics which are embraced in the law of shipping. In treating of that subject, we were sometimes obliged to state by anticipation the principles of admiralty jurisprudence; and as the admiralty court takes cognizance in this country of nearly all the cases or questions which can arise under the law of shipping, and in the far greater number of instances applies the same principles as the common-law courts, we have necessarily exhibited these principles in treating of that topic. What we purpose to do now, therefore, is to state what is peculiar to courts of admiralty, omitting whatever is common to them and courts of common law, because stated elsewhere, so far as we are able to do this, and leave what we have to say of admiralty intelligible. It will be impossible to avoid all repetition, but we shall do so as far as we can.

SECTION I.

OF THE RIGHTS AND DUTIES OF SHIP-OWNERS.

It has been held in admiralty in England, that a party holding a regular bill of sale of a ship, has the legal title, and is entitled

to the possession of it against any asserted equitable claim in others. In other words, the English court of admiralty, prior to the passage of the 3 & 4 Vict. c. 65, in determining causes of possession, looked only to the legal title to the vessel, and paid no respect to any equitable interests.[1] It may be doubted whether our courts of admiralty would declare so broad a principle as this; although the regular bill of sale would doubtless have great force here.[2] And even in England it is made a question how far a court of admiralty must regard itself as so far ministerial, that it must decree possession on the bare legal title, under a bill of sale, in opposition to the equity of the case.[3]

[1] See cases ante, p. 513, n. 1.

[2] It has, however, been distinctly held that our courts of admiralty have no jurisdiction to try questions of equitable title to vessels, and can only pass on the legal title. The Wm. D. Rice, U. S. D. C., Mass., Nov. 1857, per *Ware*, J., 20 Law Reporter, 501; and in Kellum *v.* Emerson, 2 Curtis, C. C. 79, 82, Mr. Justice *Curtis* said: "The equitable title of the libellant, as a *cestui que trust*, being denied, it must be tried; and if found to exist, a court of equity would protect it and grant the appropriate relief. But a court of admiralty has not jurisdiction to try such an equitable title, and to grant the relief appropriate to it. Though it may by a petitory suit, try the title to a vessel, I apprehend this must be confined to legal titles. I am not aware that in any case it has gone beyond these and tried and determined and undertaken to compel the performance of mere trusts. Still less that it has done so to determine rights, not to a vessel but to its proceeds." See also, Bogart *v.* The John Jay, 17 How. 399; Kynoch *v.* The S. C. Ives, 1 Newb. Adm. 205, where the court refused to decree possession of the vessel to one to whom the owner had contracted to sell her. In The Taranto, U. S. D. C., Mass., 12 Law Reporter, 5, a company was formed for the purpose of proceeding to California, a vessel bought, and the bill of sale was permitted by a vote of the company to stand in the names of their agent and treasurer, and of the captain. These parties refusing to give up the vessel a petitory and possessory suit was brought, and it was contended for the respondents that the legal title of the vessel being in them, the court could not enforce a mere equitable title. The court, however, decreed that the title was in the libellants, and ordered the vessel to be given up.

[3] The case of The Sisters seems to have been earnestly contested. As the case stands in 3 Rob. Adm. 213, it is reported that Charnock proceeded in the court to obtain possession. The other side contended that the allegation of title was not sufficient to admit him to the court. (It was a recital of the bill of sale, and an allegation that he had never sold or transferred the possession.) The allegation was admitted as sufficient. In The Sisters, 4 Rob. Adm. 275, it is reported that an allegation was given on the part of the assignees of the estate of Tubbs (possessor in the first suit), pleading several letters and exhibits, and alleging "that Charnock bought only as agent of Kirkpatrick, and that part of the purchase-money had been paid to Charnock by his employer." A correspondence was exhibited, which was asserted to have passed between them, for the purpose of showing that Charnock acted as the agent of Kirkpatrick. The counsel on the other side said that all the parties had become bankrupt,

And the court there will not interfere to give possession of the ship's register to any party whose title to be considered as the registered owner, is open to objection and doubt.[1] In this country, it has been held in the prize court, that the legal ownership is to be decided by the bill of sale; and that any equitable interests existing in the claimants are immaterial to the question of ownership.[2] But if a party has declared himself in the acts of court a part-owner in a privateer, he cannot cast off this character, or the responsibilities which attach to it for damages assessed against the privateer, even when his name does not appear on the ship's papers.[3]

The distinction above referred to, between petitory and possessory suits, which prevailed in England, prevents the decisions of their admiralty from applying fully to our own courts. Lord Stowell, while asserting both the right and the practice of his court to transfer possession from an actual holder, "sometimes by its own movement, sometimes at the instance of other courts," declares that it moves within very narrow limits, "if it proceeds at all originally upon a question of title."[4] Thus, it would act where the possessor had no right, or where force and violence or fraud were manifest, but it would not enter into the question, if there was a course of transactions involving fraud. Now we know no good reason and no authoritative decision which would lead us to suppose that an American court of admiralty would confine

and the question is whether Charnock shall be stripped of his legal title without retaining so much as is due to him on the purchase.

The court said: "How does it appear that there is any money due to Charnock on this account? That may be a material fact: because I am not disposed to hold as a clear recognized principle, that in suits of possession, this court is absolutely ministerial, and that it is, in all cases, bound to give its aid. If Mr. Charnock has already acted in such a manner as to put the property into the possession and at the disposal of the person for whom he bought as agent, the court may, perhaps, think itself at liberty to hold its hand, and leave all the parties to find their proper remedies in a court which can look into the whole of the transaction, and dispense all the justice that belongs to every part of it. But if the money has not passed to Mr. Charnock for the payment of this purchase, which it is alleged he made merely as agent, then the equity of the case will be against Mr. Tubbs." The case stood over, and is reported as above in The Sisters, 5 Rob. Adm. 155.

[1] The Frances, 2 Dods. 420.

[2] The San Jose Indiano, 2 Gallis. 268, 284.

[3] The Mary, 1 Mason, 365.

[4] The Pitt, 1 Hagg. Adm. 240, 243.

itself within such narrow limits or refuse to enter into a full investigation of any such case, in all its relations.[1] It has, indeed, been the admitted right and the practice of English admiralty, from a remote period to the present day, to take jurisdiction where part-owners cannot agree about the employment of a ship, and to apply a remedy to the case which no other courts could apply. In doing this, they have certain rules; but we should not believe that they would be recognized as of binding authority. Thus, a majority of part-owners — that is, a majority in interest — may dispose of a ship as they will, provided they give the dissenting minority adequate security for the safe return of the ship, in the proper form and to the satisfaction of the court.[2] But the reason why this jurisdiction of admiralty has always been admitted, which is "that ships are made to plough the seas and not to lie by the walls,"[3] applies just as strongly where a majority refuse to employ her at all. In this way, they might overcome the opposition of a minority and compel them to let her proceed without any security at all, if the court interfere only when the majority wished to send her somewhere. It has, therefore, been asserted by our supreme court, that if a majority refuse to employ her at all, the minority may employ the ship on giving security. And if the interests for the employment and against it are equal, the court will give possession to those part-owners who are for employment. This has, as yet, only been asserted *obiter;* and in our judgment, the English authorities do not sustain it. But the assertion of the supreme court has never been withdrawn, and we think it rests on good reasons.[4]

[1] This question is discussed at length by Mr. Justice *Story*, in the case of The Sch. Tilton, 5 Mason, 465, to which we refer the reader for a full and learned exposition of the law on this subject. See also, The Friendship, 2 Curtis, C. C. 426.

[2] Ouston *v.* Hebden, 1 Wilson, 101.

[3] Molloy, book 2, ch. 1, § 2.

[4] In Steamboat Orleans *v.* Phœbus, 11 Pet. 175, Mr. Justice *Story* said: "The majority of the owners have a right to employ the ship in such voyages as they may please, giving a stipulation to the dissenting owners for the safe return of the ship, if the latter, upon a proper libel filed in the admiralty, require it. And the minority of the owners may employ the ship in the like manner, if the majority decline to employ her at all. So the law is laid down in Lord Tenterden's excellent treatise on shipping." This may be law and we think it is; but the point did not arise in this case, it being an application by an owner of one sixth of the vessel, to have her sold, on the ground

In England, a decree of possession has been refused to one who owned only a moiety.[1] We should expect that our courts

that the vessel was being used contrary to his wish and interests; but we do not understand any passage in Abbott on Shipping, as asserting all of this doctrine. The only passages we find, read as follows: "The law of this country appears to possess an important advantage over all the ordinances that have been cited, because, while it authorizes the majority in value to employ the ship 'upon any probable design,' it takes care to secure the interest of the dissentient minority, from being lost in the employment of which they disapprove. And for this purpose, it has been the practice of the court of admiralty, from very remote times, to take a stipulation from those who desire to send the ship on a voyage, in a sum equal to the value of the shares of those who disapprove of the adventure, either to bring back and restore to them the ship, or to pay to them the value of their shares. When this is done, the dissentient part-owners bear no proportion of the expenses of the outfit, and are not entitled to a share in the profits of the undertaking; but the ship sails wholly at the charge and risk, and for the profit of the others." "If the minority happen to have possession of the ship, and refuse to employ it, the majority also, may by a similar warrant, obtain possession of it, and send it to sea, upon giving such security." "It does not appear that any of the cases which I have just referred to, arose upon an equal division of voices or interests in the ship." It seems, that this must mean, that when the majority have possession, they may not send her to sea without giving security to the dissentient part-owners, if the latter demand it; and when the minority have possession of the ship, the majority may, on giving security, take her and employ her. But nothing is said here, of the case of a majority preferring to do nothing, and of the minority acquiring thereby a right of control. If the court in Steamboat Orleans *v.* Phœbus, mean to rely on Abbott for their law, it would not seem that they have authority enough for all their conclusions.

In 3 Kent, 152, it is also said: "If the part-owners be equally divided in opinion in respect to the employment of the ship, either party may obtain the like security from the other seeking to employ her." For this, he, also, refers to Abbott, and in the next note, quotes from Steamboat Orleans *v.* Phœbus. Perhaps the mistake, if it be one, arose from this passage in Abbott, which immediately follows that last quoted: "but a learned civilian who wrote near the end of the 17th century (Godolphin, Introduction to Admiralty Jurisdiction), having spoken of this power of the majority, adds, that the same thing may also be effected by the one part only, in case of equality in partnership; this doctrine is adopted by Molloy, and is followed in the practice of the court of admiralty." The words, "and this doctrine is followed in the court of admiralty," seem to be all that this assertion is based upon. It does not appear to be a quite sufficient foundation; and unless Abbott had means of information, other than the reports give us, he was mistaken. A short review of the cases will show whether this be so or not.

In The New Draper, 4 Rob. Adm. 287, before dispossessing a master, and part-owner to the amount of seven sixteenths shares, at the suit of nine sixteenths, the court said, that for so small a majority to dispossess a part-owner in possession, some reason was necessary. The reason was given and proved sufficient. It had been argued, that all the parties proceeding in the suit were not authorized. The court said there was no competent proof of that, though there had been time to get it,

[1] The Egyptienne, 1 Hagg. Adm. 346; The Elizabeth and Jane, 1 W. Rob. 278.

would decide any question of this kind, which came before them, only as its merits, and all its merits, required.[1] Doubtless, if a

and he could not hold loose conversations sufficient to defeat the consent by which the suit had proceeded so long. Thus intimating, perhaps, that if proof could have been produced, the case would have been different. Supposing two sixteenths had withdrawn from the nine sixteenths, or that one sixteenth had gone over to the seven sixteenths, what would have been the consequence?

In The Valiant, 1 W. Rob. 64, 67, Dr. *Lushington* said: "I am of opinion, that this court can never proceed to change the possession, save at the application of a majority of the whole of the legal interests."

The See Reuter, 1 Dods. 22, was on application of a majority of the interests. So was The John of London, 1 Hagg. Adm. 342. See remarks to this effect in The Windsor Castle, 1 Notes of Cases, 118.

In The Egyptienne, 1 Hagg. Adm. 346, n., upon the fourth default being granted by the court, it was moved to decree possession "to the sole executrix of H. L., deceased, who was, whilst living, the true and lawful owner of one half part or share of the said sloop." "This motion was refused, but the court granted a monition, calling upon the other interest to appear and show cause." The reporter then adds: "The monition was not extracted, and the cause has dropped."

In The Elizabeth and Jane, 1 W. Rob. 278, on a request by a moiety for a monition to the other moiety to appear and show cause, the counsel for the petitioners argued, that "unless possession was decreed as prayed, the vessel must inevitably perish, contrary to all principles of justice and the policy of the maritime law." He cited The Egyptienne, and, among others, the very authorities cited from the civil law by Abbott, namely, Godolphin's View of Admiralty Jurisdiction; Molloy, lib. 2, c. 1; and, finally, Abbott on Shipping as above.

But Dr. *Lushington* considered that the court was not authorized to interfere in any case, except where the majority in interest invoked the protection of the court. This is a strong case, for it was decided, Nov. 11, 1841, more than a year after the statute of 3 & 4 Vict. ch. 65 (7th Aug. 1840), and it seems to oppose Abbott, Kent, and Story, at least as to English practice. But it will be noticed that the court says they would send the parties to another tribunal. Probably, to a court of chancery. In this country, would not the admiralty take the place of the equity court? It exercises many of the functions of a court of equity. And it would be inequitable for one moiety to be subjected to a serious loss from the obstinacy of the other moiety.

Upon the question of possession between dissentient part-owners, two principles appear to meet and conflict; namely, the rights of the majority, and public policy. If a moiety is divided against a moiety, the law can give possession to either, only on public grounds. And if a court of admiralty *can* interfere, it is only on the consideration *pro bono publico;* and that may have lost something of its force, since the present abundant supply of ships. Formerly ships were scarcer, and it was in some measure, an infringement on the rights of the mercantile public, a breach of a duty, if not of a kind of implied contract, to let a ship lie still; but now there are, generally at least, more ships than there is business for.

There may be a difference, too, between taking the possession from one moiety to give it to the other; and compelling the moiety already in possession to give bonds. For the latter, there may be reasons which do not apply to the former.

1 See post, for the case of The Vincennes, decided by Ware, J., but not reported, cited post, near the end of ch. 9.

majority concur in desiring any especial employment, this would be a strong *primâ facie* reason in its favor. But if it were made clear to the court that they wished to oppress the minority, or that the employment they proposed was certainly and in a high degree inexpedient, because unsafe and foolish, we know not why they should be bound to give her to the majority for any such purpose. And if the majority would employ her in this way, or not at all, we know no reason why she should not be either sold, or given to the minority, on their security.

It was said, that the majority employing a ship against the will of the minority, must give security for her safe return. The common bond taken in England from the majority goes no further; and it has been intimated in this country, that the recusant part-owner should have no freight, because he makes no advances for outfit, but may have his vessel secured to him, because, as he makes no profit, he should incur no loss.[1] This may be sound doctrine in all of those cases in which the dissentient minority are distinctly in fault. But there may be an honest difference of opinion; and although the majority in that case ought to prevail, we see no reason why the minority should not be paid for the use of their property; and we should expect that our courts would adopt this view in ordinary cases, and not hold themselves bound by any rule in admiralty, to confine the security to the return of the ship.[2]

[1] See Willings *v.* Blight, 2 Pet. Adm. 288.

[2] The question, whether the bond should secure the freight as well as the vessel, is one of importance; and we find no decisive authority to determine it. In The Apollo, 1 Hagg. Adm. 306, peremptory payment of the bond was decreed. "Upon the question of jurisdiction, it is not unimportant to observe, that the court has repeatedly gone the length of taking these stipulations, in favor of a dissentient copartner, and upon his application that a security may be given for the safe return of the vessel from the voyage to which he dissents, or otherwise for the estimated value of his share." Nothing is said about freight. Nor do we know that any admiralty court has declared that the bond may be taken for the freight. The estimated profits of the voyage are a difficult subject of computation, and that is the objection Abbott (p. 102) takes to the remedy proposed by the common-law courts for the use of the ship, by the minority, without their consent. The reason given that "as he bears no expense, he shall have no profit," is hardly logical or sufficient, for from that it would seem, that his right to profits depended on his expenditures for fitting out; but the interest of the money he has invested in the ship is not considered. In Gould *v.* Stanton, 16 Conn. 12, it was held, that until a dissentient part-owner applies to the admiralty court, he is liable for his proportion of

Of the power of the court of admiralty to decree a sale on a question between part-owners, we shall speak when we consider the subject of The Sale of the ship.[1]

SECTION II.

OF CONTRACTS OF AFFREIGHTMENT.

Whether goods are carried in a vessel on freight or by charter, the same rules of law are applicable in admiralty, unless the charterer hires the vessel wholly, and mans, equips, and sails her himself. In this case he is his own carrier, and the owner of the vessel has no lien on the cargo for the money due from the hirer, but the charterer himself, being *quasi* owner, has a lien on the goods of other persons, if he carries them in a ship he has thus hired.[2]

The first question we shall consider is, as to the jurisdiction of admiralty over questions of freight; then the application of the rules of law to these questions in civil cases; then cases which arise under prize and capture.

In treating of the law of shipping, it was stated that the ship-owner has a lien on the cargo for the freight due for carrying it. This is the rule at common law as well as in admiralty, but the latter court by its suits and processes *in rem*, has a more prompt and effectual jurisdiction in all cases of lien. Originally, the admiralty courts acted principally and possibly altogether *in personam*,[3] and even now it is admitted that its action *in rem* is

the expenses already incurred in fitting the vessel out, but after he seeks the protection of the court, he is not liable for any expenses, nor entitled to any earnings.

[1] See post, ch. 9.

[2] The two kinds of charter-parties are spoken of in our chapter on the law of shipping. See ante, Vol. I. p. 232.

[3] In The Sch. Boston, 1 Sumner, 328, 341, it is said, "The proceeding need not indeed be *in rem*, for if the thing has come to the possession or use or benefit of the owner, a compensation may be equally decreed upon a libel *in personam*. So is the doctrine in The Hope and The Trelawney, and it is founded in the very nature of the admiralty jurisdiction, which primarily acted *in personam*; and now acts *in rem*, only as auxiliary to its general authority." In The Hope, 3 Rob. Adm. 215, the objection to calling the owners to answer personally in a suit for salvage was overruled. In The Trelawney, 3 Rob. Adm. 216 note, it was said in the argument, "The old

subordinate and auxiliary to its general authority, or its action *in personam*. Nevertheless, it is quite certain that our admiralty courts claim and hold complete jurisdiction *in rem* as well as *in personam* over all maritime contracts in which there is any lien, either by force of law, or by an express pledge of the property by way of security.[1] Nor is an actual possession by the officers of the court, of the property libelled, essential to the exercise of this jurisdiction; for the court may order the property into the custody of the law, and will for the purposes of justice presume it to be in that custody unless the contrary appears.[2]

practice has always been, in the first instance, against the person; and several of the first chapters of Clerke's Practice, direct the proceedings to be against the person." The court said: "As the objection has been pressed, I shall reserve this matter for farther consideration; at present, it may be sufficient to say that the court will be extremely unwilling to hold, that because a salvor has chosen to proceed in the manner most favorable and most accommodating to the other party, he shall be deprived of substantial redress in this court."

In The Meg Merrilies, 3 Hagg. Adm. 346, a monition *in personam*, was decreed in a suit for salvage. In The Brig Draco, 2 Sumner, 157, 180, *Story*, J., said: "My own opinion has been long unequivocally expressed, that the admiralty has a rightful jurisdiction over all maritime contracts *in personam*; but that, in cases of that sort, it cannot proceed *in rem*, unless there be a maritime lien, or a positive pledge as security."

[1] In Sheppard *v.* Taylor, 5 Pet. 675, it is said, p. 711, "Over the subject of seamen's wages, the admiralty has an undoubted jurisdiction *in rem* as well as *in personam*." See also, The Centurion, Ware, 477.

[2] In The Sch. Bolina, 1 Gallis. 75, the court said: "Further; in the admiralty, in all proceedings *in rem*, the court has a right to order the thing to be taken into the custody of the law, and it is presumed to be in the custody of the law, unless the contrary appears; and when once a vessel is libelled, she is considered as in the custody of the law and at the disposal of the court, and monitions may be issued to persons having the actual custody, to obey the injunctions of the court. The jurisdiction of the admiralty, however, is not founded on that circumstance." (We suppose this means the circumstance of possession.) "It is notorious, that a condemnation may take place in a prize cause, even when the prize is lying within the port of an ally or a neutral, and this right of jurisdiction and condemnation equally applies to municipal seizures, in the name of the sovereign, while the property is in a neutral port. If, indeed, the possession of the sovereign be lost by recapture, or escape, or voluntary discharge, the courts may thereby lose the jurisdiction acquired by the seizure, but such loss is not to be presumed. On the instance side of the admiralty, its jurisdiction is not, in general, founded on possession of the thing. It may exercise complete jurisdiction as to seamen's wages, as to marine torts, as to collisions, and perhaps as to salvage, without it, and rest entirely on the process *in personam*."

In the case of Jennings *v.* Carson, 4 Cranch, 2, *Marshall*, C. J., fully discussed the

That the ship has a lien on the cargo for the freight, is an ancient and a universal rule. And the application of the law of lien to cases of freight, by the rules of admiralty, is, we think, or at least should be, more liberal and less technical than by those of common law. But, while this lien of the ship upon the cargo for its freight has never been denied, there is a great and irreconcilable diversity of opinion as to the origin, the nature, and the principles of this lien. The common-law courts of England have been always disposed to regard it as a mere common-law lien. This we should expect; and the inevitable consequence has been a strong disposition — perhaps a prevailing tendency — in our own common-law courts, to follow the English example. But this has led to some difficulties; and some judges refer it rather to the peculiar principles of the law-merchant. These differences are not technical merely or theoretical. They certainly may lead to important results, as they have led to difficult questions. But these questions are due, we apprehend, in some degree at least, to the antagonism between the common law and the Roman civil law.

There may be difficulties in regarding the claim of the ship upon the cargo as precisely a "*privilegium*" of the civil law, and as we have already said in our first volume, we do not call it a *privilegium*.[1] It certainly, however, was an essential part of the law-merchant before that became a part of the common law of England. And then, and now on the continent of Europe, it was and is distinctly recognized, although the common-law lien is nearly unknown. A *privilegium*, which is well enough translated by the phrase, "a privileged claim," differs from a lien in this; it does not depend in any degree upon possession; that is, it does not require that the creditor should ever have possession of the thing to which he may look for security; nor if he has such possession and loses it, does he thereby lose his security. On the other hand, a lien at common law is simply the right of holding on to something now in possession,

principle that the vessel when once libelled is in the possession and under the control of the court. After showing that this power is inherent in the courts, and not conferred by statute (as had been contended in argument), he shows that it necessarily results from the constitution and character of a court of admiralty.

[1] See ante, p. 125, n. 1.

until some claim or debt connected with that thing is discharged. We do not call this lien of the ship on the goods a "*privilegium*," because we cannot say that it has no reference, either in origin or continuance, to possession. But neither do we regard it merely as a common-law lien, because we do not consider it as a mere right to retain possession, and as wholly dependent on possession, and as terminated at once and necessarily by the loss of possession.

What are called liens in the law of shipping are none of them, we think, mere common-law liens; or mere continuances of the right of possession. And we have noticed that text writers who in the investigation of the principles which govern them, have gone back to the early or foreign law, adopt perhaps without intention the phraseology there used, and call the liens "privileges," or "privileged claims." Thus, *Abbott*, in the beginning of the chapter on the ship-owners' lien for freight, speaks of the lien of the cargo on the ship, as ranking "low in the precedence of *privileged claims*," and to illustrate this, enumerates nearly all the known liens against the ship, ten in number, as of more force; and then speaks of "the privilege" of the ship-owner against the goods for his freight.

This right of the ship-owner to hold the cargo as security for the freight, we hold to be in part a *privilegium*, and so far not a mere lien; and therefore it is not dependent, necessarily and entirely, upon possession, or the right of possession. And the law-merchant has many such "privileged claims;" as, for example, contracts of bottomry or respondentia. No one would think of calling the rights which these contracts give, merely liens, or of treating them as liens at common law. Nor is there any more reason in the right itself, for calling that of the ship-owner against the cargo, a lien only. The cause of this common error, for we regard it as an error, is quite obvious. The main difference between a *privilegium* and a lien is, as we have seen, this: the former is not dependent upon possession, but the latter is. Now the contract of bottomry, for example, actually provides that the ship shall go away, out of the possession and immediate reach of the creditor (for which departure it provides the means), and that the debt itself shall be due only on condition that the ship performs the voyage safely. It would therefore be merely absurd to say that the security of the creditor depends in this

case, upon his retaining possession, for the very essence and purpose, and the very words of the contract, require the ship to pass out of his possession.

But in the contract for freight, the bargain is that the goods shall be put into the possession of the ship-owner, and shall remain in his possession until the freight becomes due and is paid. Here, therefore, the nature of the bargain, and the terms of the contract, give to this "privileged claim" that element of possession which the common law gives to every lien. The essence of the bargain is, that the ship shall take possession of the goods and carry them, and then keep possession of them for the freight. And if the parties agree that the goods shall be delivered first, that is, shall pass out of the possession of the ship-owner before he gets his freight, and that he shall then look, not to the goods, but to the shipper for his freight; this would destroy the security by terminating the lien; and thus, in effect, it appears, to convert the privilege into a lien. Or, in other words, this right of the ship to the goods seems, for these reasons, to be perfectly dependent upon possession, and therefore, we think, it has been called and treated as a mere lien. But there is still a difference between these two views of this right, which is more than technical, and may be very substantial. It is this. If this right be a lien, it is at once destroyed by any agreement which provides that the possession of the ship-owner shall terminate in any way before he gets his freight. Not so, if it is, or so far as it is, a *privilegium*. There the security of the cargo will not be lost, unless it is a fair inference from all the terms and circumstances of the contract, that the parties intended to take this security away; or unless (whatever be their intention) it could not be enforced without injury to an innocent third party who had purchased the cargo, or acquired rights over it. Valin says, as we have seen, that the ordinance of Louis XIV. in practice permitted the ship-owner to retain his right against the cargo fifteen days after it had been delivered, unless it were in the mean time sold to a purchaser without notice. We do not suppose our admiralty courts would adopt this or any other exact rule; but wherever there was a bargain which provided that the shipper, or consignee, might take the goods first, and afterwards pay for them, but which, by reason of its terms or its circumstances, should be construed as indicating no intention on the

part of the ship-owner to give up his security on the cargo, we should confidently expect a court of admiralty to protect this security by a process *in rem* against the cargo. But, it must be confessed, that recent decisions have shaken this confidence somewhat.[1]

Abbott remarks: "The clause whereby the merchant binds the cargo, does not give to the owner a lien on the cargo for the performance of the covenants in the charter-party, nor for any payments for which he might not detain it in the absence of such a clause, so that with us the clause is inoperative."[2] We apprehend that an American court of admiralty, always of course regarding the equities of each case, would generally enforce by adequate process that security upon the cargo, which the terms of the contract would purport to give.[3] But it is certain that express agreements as to this lien or claim, might make the

[1] See ante, Vol. I. p. 125, n. 1; and p. 145, n. 1. The case of Sears *v.* Certain Bags of Linseed, there referred to as then pending before Mr. Justice *Clifford*, has been decided since that portion of our work was in press, in favor of the claimants, affirming the decision of Mr. Justice *Sprague*. An appeal has been taken to the supreme court and is now pending. The case was argued on an agreed statement of facts which were in substance as follows: The libellants being owners of the ship "Bold Hunter," chartered her to Tuckerman, Townsend & Co., for a voyage from Calcutta to Boston, at a specified rate of freight per ton. The charter-party contained the usual lien clause, and stipulated that freight should be paid, "one half in five, the balance in ten days after discharge in Boston, said credit on payment of charter not to impair ship-owner's lien, on cargo for freight." On arrival at Calcutta, the agents of the charterers did not deem it expedient to load the ship on their account, and assigned the charter-party, with the consent of the master, to Wills & Co., who agreed to furnish a cargo at a lower rate of freight. Wills & Co. furnished a cargo, of which the principal part was on account of, and consigned to, Augustin Wills of Boston. The bills of lading were filled up in the usual form at the new rates of freight, without reference to the charter-party. On arrival of the ship at Boston, the goods were discharged and delivered to the agent of the consignee, and nothing was said of the intention of the ship-owners to look to the goods for their freight. During the time of the discharge, five thousand dollars were paid to the ship's husband on account of freight, not, as was afterwards alleged, as a matter of right, but merely as an accommodation. Applications were made after the expiration of the five and ten days, for the payment of the balance, which were refused, first, on the ground that as the consignee had died, nothing could be done until administration was taken out, and afterwards because, as it was said, the estate might prove to be insolvent. This action was then brought *in rem* against the goods, they being still in the hands of the administrator of the consignee. The administrator claimed them, and his claim was allowed. The practical effect of the decision is, that the libellants come in with the other creditors for their dividend, instead of holding the goods as security for their whole claim.

[2] Abbott on Shipping, 286.

[3] See ante, Vol. I. p. 254, note.

question whether they confirmed, or annulled, or in any way qualified the claim as given by the maritime law, one of great difficulty. And, if a ship-owner who has this privileged claim, delays long, and without cause or excuse, to enforce it, he would be held in this case, as in all other cases of maritime lien, to have renounced or lost it.[1]

The owner of the cargo has a lien on the ship, for any injury he may sustain by the fault of the ship or of the master. And this lien may be sustained in admiralty by a suit *in rem*. And the vessel is regarded as pledged to the owners of the goods, from the moment the misfortune happens, and their claim will be held prior to the general creditors of the owners.[2] And though this lien will be lost by unreasonable delay, it is not defeated even by a *bonâ fide* sale with transfer of possession, if made before the shipper had the opportunity of enforcing his lien. This would be so, even if the purchaser were ignorant of the lien, unless the delay had been such, as to cause or substantially contribute to the purchaser's buying a vessel thus incumbered.[3]

[1] In The Rebecca, Ware, 188, 211, which was an action *in rem* against a vessel for damages sustained by goods on board, it was contended that the shipper had lost his lien by neglecting to enforce it within a reasonable time. The evidence was, that the shipper resided in New York, and the vessel belonged to Portland, in Maine; that as soon as the shipper heard of the loss he ordered process to be commenced, but before it could be served she left the port and did not return for nine months, when she was immediately arrested. In the intervening period, she was engaged in transporting rocks between the Hudson River and the Delaware Breakwater, and passed the city of New York at every trip, and that twice she stopped at that port for a few days; but there was no evidence that these facts were known to the libellant, and the court was of the opinion that the circumstances were not strong enough to justify a presumption of knowledge on the part of the libellant that the vessel was at New York, and it was held that the delay was no bar to suit.

[2] The Rebecca, Ware, 188, 211; The Phebe, Ware, 263; The Waldo, Daveis, 161; The Sch. Volunteer, 1 Sumner, 551; Certain Logs of Mahogany, 2 Sumner, 589; Steamboat Robert Morris *v.* Williamson, 6 Ala. 50; and cases cited ante, Vol. I. p. 124, n. 1. In Rich *v.* Lambert, 12 How. 347, which was an action *in rem*, no question was made as to the jurisdiction of the court, except by Mr. Justice *Daniel*, who dissented on the ground that as the contract was made on land, that is, in the city of Liverpool, and was to be fulfilled on land by the delivery of the merchandise in the city of Charleston, there was no jurisdiction in admiralty. We should suppose, however, that most maritime contracts are made on land; and nearly all suppose an arrival somewhere, and the completion and consummation of the contract on or after such arrival.

[3] The Rebecca, Ware, 188, 212.

Nor will acceptance of the goods by the consignee or a receipt that they are delivered in good order, defeat or waive this lien, unless made with a knowledge of the injury, or under circumstances which fairly indicate an intention to waive the lien.

In a case where a person took passage on board a vessel, but his personal baggage did not reach him before he sailed, and it was afterwards put on board another vessel by the agent of the libellant and a bill of lading given therefor, but the baggage never arrived, it was held, that the vessel was liable *in rem*, the case being considered as an ordinary shipment on freight, and the owner of the vessel not a gratuitous bailee.[1]

The jurisdiction of the admiralty over actions *in personam*, for the non-delivery of the cargo, has been fully sustained by the Supreme Court of the United States.[2] But it has been held, that where a vessel is detained in her port of lading by ice, and her cargo is damaged before she can proceed, a shipper cannot, without rescinding the contract, sustain a libel *in rem* for a breach of the bill of lading, until the term for the performance of the contract has expired.[3]

SECTION III.

OF FREIGHT IN CASES OF PRIZE.

In reference to the questions of freight in cases of prize and capture, they belong, for the most part, exclusively to admiralty.

[1] The Elvira Harbeck, 2 Blatchf. C. C. 336.

[2] New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344.

[3] Jones *v.* The Floating Zephyr, U. S. C. C., Penn., 7 Am. Law Register, 494. The vessel, in this case, was lying at the port of Philadelphia bound for Liverpool. In the month of December, a number of barrels of flour belonging to the libellant were shipped on board and bills of lading given. A quantity of corn was also shipped by other persons, by which it was alleged the flour was damaged. In the month of February following, the flour was taken on shore by order of the master, and surveyed and ordered to be reshipped. The vessel sailed after the filing of the libel in this case, and delivered her cargo to its consignees. The court held, that the action was prematurely brought, and the libel was dismissed. This decision is, however, we think, open to the objection that at the time the suit was brought, the vessel had incapacitated herself from delivering the flour in good condition, and therefore an action would lie immediately. See 2 Parsons on Contracts, 179.

The first question is this, if an enemy's cargo is captured in a neutral vessel, has the vessel a claim on the captors for freight? It would seem that it has; for the cargo is distinct from the freight; one belongs to an enemy and may be made prize of, but the ship belongs to a friend and must not be taken.[1] But the rule is limited by the reason of it; and if the cargo be contraband,[2] or the voyage be *quasi* contraband,[3] or undertaken to

[1] In a note to The Atlas, 3 Rob. Adm. 304, in answer to an assertion of M. Schlegel, a French author, that the English never gave freight to a neutral vessel, the reporter makes the following reply: "So long back as the year 1640, it is asserted on the authority of Sir H. Martin, who was an eminent practitioner and afterwards judge of the court of admiralty, that it had never been the practice to condemn neutral ships for having enemy's goods on board, but the freight of the enemy's goods condemned was always paid. Sydn. St. Papers, vol. 2, p. 662. In the year 1704, in the court books of the admiralty, there is the case of The Pearl, Thompson, in which a question was raised on this point, though the particular circumstances on which the demand was resisted, do not appear. In the result, freight was decreed to the ship, restored on a claim of a Mr. Eliason, a Danish merchant, although the cargo claimed for him also was condemned. In the year 1753, in the celebrated answer to the Prussian memorial, it is asserted, that in the case of ships restored, freight was paid for such of the goods as manifestly belonged to the enemy and were condemned; and among the list of Prussian cases referred to, there is a class described, 'Ships restored with freight according to the bills of lading for such goods, which were found to be the property of enemy, and condemned as prize.' Conformable to the ancient principle of the Consolato and these precedents, has been the invariable practice of the British court of admiralty during the last and the present war, unless in cases where some circumstance of *mala fides* occurs," etc. etc.

The general rule and its exceptions are thus stated by Mr. Justice *Story* in The Commercen, 2 Gallis. 261, 264, 1 Wheat. 382: "The general rule, that the neutral carrier of enemy's property is entitled to his freight, is now too firmly established to admit of discussion. But to this rule, there are many exceptions. If the neutral be guilty of fraudulent or unneutral conduct, or have interposed himself, to assist the enemy in carrying on the war, he is justly deemed to have forfeited his title to freight. Hence, the carrying of contraband goods to the enemy, the engaging in the coasting or colonial trade of the enemy, the spoliation of papers, and the fraudulent suppression of an enemy's interest, have been held to affect the neutral with the forfeiture of freight. And in cases of a more flagrant character, such as carrying despatches or military passengers, for the enemy, or an engagement in the transport service of the enemy, or a breach of blockade, the penalty of confiscation of the vessel has been also inflicted." See also, The Prosper, Edw. Adm. 72.

[2] The Sarah Christina, 1 Rob. Adm. 237; The Mercurius, 1 Rob. Adm. 288.

[3] In The Commercen, 2 Gallis. 261, it was held, that a neutral cannot lawfully be the carrier of provisions for the supply of the army of a belligerent, although such army may be in a neutral country and directly engaged in hostilities against a third belligerent. This was affirmed by the supreme court, 1 Wheat. 382, *Marshall*, C. J., *Livingston*, J., and *Johnson*, J., dissenting.

relieve an enemy from the distress caused by war, as a carrying on of her coasting trade,[1] or colonial trade,[2] then, it seems, the neutral vessel forfeits her freight. And the vessel is not entitled to freight, if the master ceases to act as a neutral, as by the spoliation of papers.[3] Capture is considered equivalent to delivery where the captor possesses himself fully of the right of the enemy and represents him, and by the capture prevents the ship from earning her freight, and the neutral is in no fault.[4]

But if a vessel goes into port to repair, and is there seized and required to prove her neutrality, and the delay in doing this, makes it necessary to transfer the goods before she is liberated, she has earned only a *pro rata* freight, because it was not the fault of the goods, but her own distress, which caused the

[1] The Atlas, 3 Rob. Adm. 299, 304; The Emanuel, 1 Rob. Adm. 296; The Allegoria, 4 Rob. Adm. 202, n. In The Wilhelmina, 2 Rob. Adm. 101, n. it was held, that this rule did not apply to voyages from the port of one enemy to the port of another, if no fraudulent or false proceedings appeared in the conduct of the ship.

[2] The Immanuel, 2 Rob. Adm. 186; The Anna Catharina, 4 Rob. Adm. 107; The Minerva, 3 Rob. Adm. 229, note; The Anna Dorothea, 3 Rob. Adm. 233, note. In The Rose, 2 Rob. Adm. 206, the voyage was from the port of one enemy to the colony of another enemy allied in the war. It was held, that there was no solid distinction between this case and those above cited. The ship also is sometimes confiscated for trading between the mother country and a colony of the enemy. The Jonge Thomas, 3 Rob. Adm. 233, note; The Phœnix, 3 Rob. Adm. 186; The Star, 3 Rob. Adm. 193, note.

[3] The Rising Sun, 2 Rob. Adm. 104. It was objected, in this case, that the owners were at a great distance and in no way privy to the act of the master, but the court said, that "men must abide the consequences of their own misplaced confidence."

[4] The Racehorse, 3 Rob. Adm. 101, was a case of a British ship freighted from Liverpool in ballast, to St. Martin's and Lisbon, to bring a cargo of fruit to Ireland, taken on her return voyage by a French privateer off Falmouth; and afterwards recaptured and brought to Falmouth. The ship was restored by consent, on the 2d of July; the cargo was not restored until 16th November. The court held, that the whole freight was due, on the ground, that it was not the ship's duty to stay by and see what would be done with the cargo.

In The Martha, 3 Rob. Adm. 106, note, an American ship from America to Amsterdam, was captured in the Channel, the ship was restored with freight. One parcel of goods for which a claim had been given was restored, but had to be delivered in order to get at the rest. The claimant demanded of the master that he should take them on board again, and offered to pay the expense of transshipment. This he refused to do, and demanded his whole freight. The court, Sir *William Scott*, gave it, on the authority of the case of The Hamilton, decided by his predecessor. See also, The Hoffnung, 6 Rob. Adm. 231.

transshipment.[1] Freight is not payable when the ship is lost by accident or superior force.[2]

In one case, where the incapacity to proceed fell on both ship and cargo, the court on principles of equity decreed that the loss should be divided, and that a moiety of the freight should be paid.[3] If the neutral sail under a license, no freight is allowed on articles not enumerated in the license.[4]

The rule, that freight is not earned unless the goods are carried to their destination, applies to capture. But, if neutral goods are in an enemy's ship and the captor in fact takes the goods, where they should have been carried,[5] and even if he does

[1] In The Copenhagen, 1 Rob. Adm. 289, the ship was obliged to put into a port short of her destination for repairs; the ship and cargo, being seized as prize, were restored, but the ship claimed full freight as in a case of capture. Freight *pro rata* was given. The court said: "The maxim that capture is delivery, is by no means to be taken in the general way in which it has been laid down (by counsel for the ship). It is by no means true, except where the captor succeeds fully to the rights of the enemy, and represents him as to those rights. If a neutral vessel, having enemy's goods, is taken, the captor pays the whole freight, because he represents the enemy by possessing himself of the enemy's goods *jure belli*; and, although the whole freight has not been earned by the completion of the voyage, yet, as the captor by his act of seizure, has prevented its completion, his seizure shall operate to the same effect as an actual delivery of the goods to the consignee, and shall subject him to the payment of the full freight. But if ship and cargo being both neutral are restored, the consequence is only that the ship must proceed on and complete her voyage before she can demand her freight. If the cargo is restored while the ship continues under detention, still less reason is there to contend that she has earned her freight. Such is the present case, in which the ship has failed in her contract; and this is not owing to the cargo in any manner, but to her own state of distress originally, and afterwards to her dubious character. Under these circumstances, it is impossible to say that she has earned more than a freight *pro rata itineris*."

[2] In The Saratoga, 2 Gallis. 164, 178, it is said, "It seems to be a doctrine of our law, that if a voyage be broken up by an interdiction of commerce with the port of destination, after its commencement, no freight is payable. And the same rule is applied to cases where the voyage is lost by accident or superior force. In short, the principle seems to be, that there must be an actual delivery of the cargo at the port of destination, to entitle the party to his full freight." See also, cases ante, Vol. I. p. 151, 152.

[3] The Friends, Edw. Adm. 246.

[4] The Jonge Clara, Edw. Adm. 371.

[5] The Vreyheid, before the House of Lords, 1784, cited 4 Rob. Adm. 282; The Fortuna, 4 Rob. Adm. 278. In The Fortuna, Edw. Adm. 56, a Danish ship going to Portugal with a Portuguese cargo, was legally detained under an embargo act, and brought to England. The goods at the time, might legally have been sent on, but afterwards, hostilities having commenced between England and Portugal, they could not be

this substantially, though not precisely, as where English captors took, in a Dutch ship, and carried to England, English goods which had been sent from a Dutch colony in a Dutch ship to Holland, with the intention of remitting the proceeds to London, because there was no other way to get them from that colony to England, he is entitled to his freight;[1] he will have freight, even if he takes the goods to another port in the same country to which they were to go, unless, perhaps, this one substantially differed from their port of destination. Nor will the court of admiralty look carefully at the expense or profit of the thing, in applying this rule.[2] If the captor, however, injure the property, he is liable to a claim by way of offset; and if the prize-master lose negligently a ship which is ordered to be restored in value, because wrongfully taken, full freight will be decreed against the captor, although only a part of the goods be saved.[3] But a captor held to pay freight, will not be bound in

forwarded, and were sold in England. It was held, under these circumstances, that the captors were not entitled to their freight. It was said, that had an actual war prevented the goods from going on at the time of their seizure, freight might have been allowed, but that "there was not an existing incapacity upon them at the time of capture." It was also held, that the sale in England did not make that country their place of destination within the rule.

[1] The Diana, 5 Rob. Adm. 67.

[2] In The Vrow Henrietta, 5 Rob. Adm. 75, note, it was objected, that the captors had not brought the goods to London, to which port they were destined, but to Plymouth, but the court held they were bound to pay for freight. And in the case of The Ship Ann Green, 1 Gallis. 274, 294, Mr. Justice *Story* held that captors, who brought goods to Boston, which were destined to New York, were entitled to their freight.

[3] In The Der Mohr, 4 Rob. Adm. 314, the ship had been decreed to be restored in value, with freight to be a charge on the cargo which was ultimately condemned for want of further proof. But the cargo had been lost, together with the ship, by the negligence of the prize-master. The captors were held liable for the freight, the cargo being lost, the fund from which it was to be paid. Sir *William Scott* said, "On the principle of law, however, I am of opinion that the freight must be taken as having become as much the property of the neutral claimant, as the ship itself. The captor took *cum onere*. If the loss had happened by accident only in bringing in, the captor, having made a justifiable seizure, would not have been liable to any restitution, either for the freight or for the ship; but the court has already pronounced this loss not to have arisen from any casual misfortune. The freight is as much a part of the loss as the ship, for he was bound to answer equally for both. The captor has, by taking possession of the whole cargo, deprived the claimant of the fund to which his security was fixed. He was bound to bring in that cargo, subject to the demand for freight. He was just as answerable for the freight of the voyage as for the ship which was to earn it, or which was rather to be considered as having already earned it. In the room of this

all cases by the terms of the charter-party, but if those are excessively high from the influence of peculiar circumstances, a different and more equitable rule will be applied.[1] In a case of recapture, and a claim of salvage thereon, if a commencement of the voyage takes place and it is afterwards completed, the whole freight is included in the valuation of the property on which salvage is decreed.[2] Where a vessel, fitted out in one of our ports in breach of neutrality, was captured and restitution decreed, rejecting the claim of an alleged *bonâ fide* purchaser in a foreign port, it was said, that he would have been entitled to repayment of the freight which he had paid on the captured goods, if the claim had been presented to the court in time; and the same was said of an innocent neutral carrier, the goods having been transshipped in a foreign port.[3]

Where vessels were seized in port preparatory to hostilities against the country to which they belonged, it was held that the freight due, went to the crown, on the ground that it had succeeded to the rights of the ship-owners.[4] But the owners were permitted to deduct from the cargo, money they had advanced to the master for repairs, it being an advance of freight and not an average.[5]

In cases of capture and restoration of the property captured, it is the general rule that the freight (being made a charge on the cargo) takes precedence of the claim of the captor for his expenses. But it is also said that where the captor is entitled to

fund, the captor has substituted his own personal responsibility, for the loss accrues by the fault of his agent. I see no distinction under which I can pronounce that the claimant is not as much entitled to the freight as to the vessel." (The captor was held to be liable for the vessel in the same case. 3 Rob. Adm. 129.)

[1] The Twilling Riget, 5 Rob. Adm. 82.

[2] The Dorothy Foster, 6 Rob. Adm. 88. The vessel, in this case, had sailed from a port in the island of Jamaica, and was on her way to another port for the purpose of joining convoy, and it was held, that the voyage had commenced within the rule. But it was said, that had the vessel been cut out of port and then recaptured, no salvage would have been allowed on the expected freight. It may be questioned, however, how far this distinction comports with the recent doctrine, that the lien for freight exists the moment the goods are put on board.

[3] The Santa Maria, 10 Wheat. 431.

[4] The Prosper, Edw. Adm. 72.

[5] The Constantia Harlessen, Edw. Adm. 232.

his expenses, his claim is prior to that of the neutral master for his expenses.[1]

[1] In The Bremen Flugge, 4 Rob. Adm. 90, the court held that freight was a lien on the cargo which the captors were obliged to satisfy, as they took the cargo *cum onere;* but that the expenses of the captor took the priority of the expenses of the neutral master. In The Vrow Henrica, 4 Rob. Adm. 343, the court expressly sustained the decision in The Bremen Flugge. Sir *Wm. Scott* said: "I have considered the cases which I directed to be looked up, and I see no reason to alter the opinion which I before expressed, that freight is, in all ordinary cases, a lien which is to take place of all others. The captor takes *cum onere.* It is the allowed privilege of neutral trade to carry the property of the enemy, subject to its capture, and so the temporary detention of his vessel; and if the party does not prevaricate or conduct himself in any respect with ill faith, he is entitled to his freight. This is the rule I am disposed to apply in all cases of neutral ships carrying on their ordinary commerce."

CHAPTER VI.

OF SEAMEN.

We have already in our first volume considered most of the topics which have arisen relative to the rights, duties, and liabilities of the master and crew. The subject of wages we, however, reserved to consider in this place, as coming more particularly within the scope of admiralty jurisdiction.

It has been settled that where seamen ship on board a privateer, and before the cruise begins, become disabled by sickness, and neither assist in making prizes actually or constructively, they are not entitled to any share in them.[1] The same rule would doubtless be applied to a suit for wages in an ordinary case of a merchant ship. For the settled rule appears to be, that if the voyage is broken up, or the seamen are dismissed without cause before the voyage begins, they have their wages for the time they serve, and a reasonable compensation for special damages;[2] and if wrongfully discharged, after the voyage begins, they have wages for the whole voyage.[3] And in cases where the voyage is broken up by misfortune, so that the master

[1] Ex parte Giddings, 2 Gallis. 56. In this case the libellant went on shore before the cruise began, and by so doing voluntarily abandoned the enterprise. It was admitted that if he had left the ship after the cruise began, he would have had a right to his share of the adventure. And the court said that if a disability happen before the voyage is begun, the mariner should be paid a reasonable sum, for any services actually rendered.

[2] Parry *v.* The Peggy, 2 Browne, Civ. & Adm. Law, 533, is as follows: "The promovents had agreed for monthly wages, for a voyage to the West Indies. They worked on board the ship for some days in the harbor of Dublin; afterwards the owner of the ship, having changed his mind, determined to alter the voyage, and to postpone the sailing of the ship, whereupon the seamen were dismissed without their wages, who now libelled against the ship. As surrogate of the admiralty, I decreed for the seamen, on the reason of the thing, and the authority of Wells *v.* Osmond, 2 Show. 238." What wages were decreed does not appear.

[3] See cases ante, Vol. I. p. 462, n. 5.

would be justified in discharging the crew, they would still be entitled to their wages.[1] If the seaman is compelled to desert by the cruelty of the master he has his wages in full.[2] If a person is disrated on account of being incompetent to fulfil the duties of his office, and discharges afterwards the duties of his inferior station with fidelity, it may not be quite certain on the authorities, how he should be rewarded, but on principle, we should say, that a reasonable deduction should be made from the agreed price while he filled the station for which he shipped, and that he would be entitled to the regular wages while he filled the lower station.[3] A seaman is entitled to the whole of his wages, although disabled by sickness, even if by reason of that

[1] In Bray *v.* Ship Atalanta, Bee, 48, the vessel struck in going over Charleston bar, and was obliged to put back to Charleston, where she was condemned as unseaworthy. Wages for the time the men were on board were decreed. In The Elizabeth, 2 Dods. 403, the vessel was at a foreign port in a state of distress. As it would have taken a long time to make the repairs, the master discharged the crew, as he alleged, with their consent, and paid their passage home. The seamen claimed wages to the time of the vessel's return. But the court held that although the discharge was justifiable under the circumstances, yet that the crew were entitled to their wages up to the time of *their* return home. The consent, on their part, to the discharge, was held not to be voluntary, as there was no alternative but starvation left. In The Fair American, Bee, 134, it was held that seamen who had been taken by a privateer from their vessel and rejoined her at the earliest opportunity, were entitled to their wages, as they were absent without any fault of their own, and that as the first voyage was defeated, the seamen were bound to continue with the vessel till the voyage in contemplation was ended, and at the same rate of wages, and that they should receive two thirds of what was due to them, and the remainder at next port of delivery.

[2] Sherwood *v.* McIntosh, Ware, 109; The America, Blatchf. & H. Adm. 185; The Minerva, 1 Hagg. Adm. 347; Ward *v.* Ames, 9 Johns. 138; Limland *v.* Stephens, 3 Esp. 269; Prince Edward *v.* Trevellick, 4 Ellis & B. 59, 28 Eng. L. & Eq. 295. In Rice *v.* The Polly & Kitty, 2 Pet. Adm. 420, wages were only demanded for the time the seaman remained on board.

[3] It is very obvious that he would not be allowed to obtain the rate of wages for which he shipped, if he were unfit for the station; nor would the wages of the inferior station be a criterion of the proper rate of recompense before he was disrated. Mr. Justice *Ware*, in Sherwood *v.* McIntosh, Ware, 109, 110, after stating for what a man might be disrated, said: "In such a case the master will also be justified, not in refusing altogether to pay him wages, but in making from them a reasonable deduction." In The Elizabeth Frith, Blatchf. & H. Adm. 195, 210, it does not clearly appear what wages were allowed. The language of the court is: "The cook was properly degraded, and can only recover wages for the duties he performed, namely, those of an ordinary seaman." In Smith *v.* Jordan, U. S. C. C., Mass., 1857, 21 Law Reporter, 204, where a cooper was degraded to the position of a foremast hand, when the court considered he should have been tried as a cooper's mate, it was held that he should receive the wages of the latter office.

sickness he was obliged to be left at a foreign port,[1] and *a fortiori* if sent ashore on the ship's business he there fall sick.[2] But if he recover and may rejoin his ship, but does not, this stops his wages from the day when he could have joined her.[3] Of course, if the sickness was caused by the fault of the seaman, he is not entitled to any wages during the time he is off duty.[4]

If a seaman wrongfully discharged and therefore claiming full wages, has earned other wages in another vessel, in an intermediate time, it would seem that the question whether these wages are to be deducted, would be affected, at least, if not determined, in this country, by the question whether the wages allowed, after the deduction, give him an adequate indemnity.[5] So whether

[1] Mahoon *v.* Brig Glocester, Bee, Adm. 395. In Chandler *v.* Grieves, 2 H. Bl. 606, note, the plaintiff shipped on a voyage from London to Honduras, thence to Philadelphia, and thence back to England. While in the bay of Honduras the plaintiff was injured while on duty, and was afterwards put ashore at Philadelphia, and his wages up to that time paid. This action was brought to recover wages for the whole voyage. The court were of the opinion that the rules of maritime law should govern, and directed an inquiry to be made in the courts of admiralty, whether, according to the usage there, a disabled seaman would, under similar circumstances, recover wages for the whole voyage. On an inquiry being made, it was found "that in every instance a seaman disabled in the course of his duty, was holden to be entitled to wages for the whole voyage, though he had not performed the whole." In Hainey *v.* The Tristram Shandy, Bee, Adm. 414, the libellant was sent in with a prize, and soon afterwards fell sick. The vessel during the cruise, came into the same port to refit, and a part of the crew left her, and the old cruise was broken up, and new articles entered into without the libellant's consent. Held that he was entitled to recover his share of all prizes taken before the time expired for which the original articles were signed, notwithstanding he was on shore, sick, at the time. See also, Nevitt *v.* Clarke, Olcott, Adm. 316; and cases ante, Vol. I. p. 456–458.

[2] Hart *v.* The Littlejohn, 1 Pet. Adm. 115, 117, per *Peters*, J.

[3] Williams *v.* The Hope, 1 Pet. Adm. 138.

[4] Johnson *v.* Huckins, U. S. D. C., Mass., 6 Law Reporter, 311. The libellant, in this case, admitted that the sickness was caused by his own fault, and deducted the amount which would have been due, while he was off duty. The court held that the respondents were also entitled to set off the amount due for board and subsistence during the sickness; but not wages paid a substitute, there being no evidence that these amounted to more than the wages deducted.

[5] Emerson *v.* Howland, 1 Mason, 45, 54; Hutchinson *v.* Coombs, Ware, 65. See Hoyt *v.* Wildfire, 3 Johns. 518. The principle laid down by Mr. Justice *Story* in the case first above cited is, that in no case are the wages earned in the intermediate time to be deducted from the wages due, but merely from the expenses of the return to the home port, and that even then they are not to be deducted, if such a course would deprive the seaman of his just indemnity. In Sheffield *v.* Page, U. S. D. C., Mass., 18 Law Reporter, 99, it was held that when an officer was tortiously discharged at a foreign port, he was not obliged to work his way home as an ordinary seaman, and

seamen should have wages to the end of a prosperous voyage, however long, or only wages to the time when they actually reached home, or might have reached home, must depend upon the circumstances and merits of each case.[1] The right of the seamen is in fact a claim for damages for breach of contract, and there should be an indemnity. That is, they should be put into as good a condition as they would have been in, had the contract been performed.[2] Thus, if the discharge is caused by a disaster which is almost a wreck, making the repairs expensive and of doubtful utility, the least expense and wages which will bring them home, would seem to be all they should have.[3] If the master detains the clothes of the seaman, damages for the detention may be recovered in the libel for wages.[4]

We have already considered in what cases the three months' wages, payable to the American consul in case of the discharge abroad of an American seaman are due,[5] and the seaman may, it is held, if the amount is not paid to the consul, recover it at home by a suit in admiralty, and the court will decree two months' wages to be paid over to him, retaining the other third for the United States.[6] But it has been doubted whether it was, by the terms of the statute, payable anywhere or to any person, but the American consul,[7] or recoverable at common law.[8] If the money is paid over to the

that if he did so, not being able to obtain the situation which he had before held, wages thus earned, were not to be deducted. When this case came up on appeal, this point does not appear to have been controverted. Page *v.* Sheffield, 2 Curtis, C. C. 377.

[1] See cases cited ante, Vol. I. p. 462, n. 5.

[2] The Dawn, Ware, 485, 494, per *Ware*, J.

[3] See The Elizabeth, 2 Dods. 403, cited ante, p. 574, n. 1.

[4] Hutchinson *v.* Coombs, Ware, 65. In Nevitt *v.* Clarke, Olcott, Adm. 316, 321, it was held that in the absence of any proof, the court would not infer that a seaman's clothes were detained when he left the ship to be placed in a hospital, and the court said: "The inference that a sailor's wearing apparel is detained by the ship could never be raised, except in case of his desertion, or being forcibly put ashore or wrongfully abandoned by the master when ashore."

[5] See ante, Vol. I. p. 460, n. 1; p. 461, n. 1.

[6] Emerson *v.* Howland, 1 Mason, 45; Orne *v.* Townsend, 4 Mason, 541; Pool *v.* Welsh, Gilpin, 193. In the following cases it does not clearly appear whether the owners were held liable for more than two months' wages. The Dawn, Ware, 485; The Saratoga, 2 Gallis. 164; Wells *v.* Meldrun, Blatchf. & H. Adm. 342.

[7] See Pool *v.* Welsh, Gilpin, 193.

[8] In New York, the supreme court of the State has held that the seamen cannot

consul and he retains it, it has been held, that the owners having complied with the act of congress are no further liable.[1]

And if the libellant is named as an American seaman in the master's list of the crew, this entitles him to recover, although omitted to be named as such seaman in the list of the crew certified from the collector's office.[2]

If, by the shipping articles, the wages are not to be paid until the voyage is wholly ended, there is a difficulty in recovering them at common law, if the voyage be interrupted or broken up at any intermediate port. But none whatever in admiralty; for on a libel for wages, stating facts of this kind, and making out a case where the wages are not forfeited, but they, or compensation in some form, are earned, the court will decree either wages as such, or damages in the form or stead of wages.[3]

The owner is bound by a contract, made by a master, for services to be paid by shares as much as if by wages.[4] But when a seaman who had contracted for wages, had been fraudulently induced to sign articles by which he was to have shares instead, it was held, even at common law, that the first contract was in force, and the latter not; and it would undoubtedly be so held in admiralty.[5] A contract to serve as seaman for shares, either on a fishing or whaling voyage, does not constitute a partnership.

recover this amount at common law. Ogden *v.* Orr, 12 Johns. 143; Van Beuren *v.* Wilson, 9 Cow. 158.

[1] Frederichsen *v.* 290 Barrels Sperm Oil, U. S. D. C., Mass., 1859. It appears from this case, that it is the universal custom of the American consul at Fayal to retain the three months' wages, on account of the United States, and to pay no part thereof to the seamen.

[2] Orne *v.* Townsend, 4 Mason, 541.

[3] The difficulty at common law, mentioned in the text, is not felt in admiralty, since it has been repeatedly decided that the seaman's right to wages flows from the service, and not from the contract or shipping articles. See Mahoon *v.* Brig Glocester, Bee, Adm. 395, where the point was decided in answer to a plea to the jurisdiction; and The Trial, 1 Blatchf. & H. Adm. 94, where the point was directly decided. Also in Moran *v.* Baudin, 2 Pet. Adm. 415, a seaman sued for his wages because the captain had deviated repeatedly from the voyage agreed upon, and although the parties were both Frenchmen, and the ship had not returned to the port to which she was to return, wages were decreed. It seemed to be on the ground, partly, of the French law. The Dawn, Ware, 485, will be found to be directly in point. The ship was sold by reason of a disaster, and though the two months' extra pay was not allowed, the wages were.

[4] Baker *v.* Corey, 19 Pick. 496.

[5] Baker *v.* Corey, 19 Pick. 496.

This is now settled, as well at common law as in admiralty;[1] nor would it make a partnership between one who shipped as mate and the master or owner.[2]

If any political events, as a change from war to peace, greatly diminished the risk of the service, on account of which risk the wages were very high, they are nevertheless undiminished by this change.[3]

If a seaman, on monthly wages, dies during the voyage, it is certain that wages are due to his representatives to the time of his death. But it is quite uncertain whether they are due to the end of the voyage. We think they are not.[4] And any bargain for

[1] See cases ante, Vol. I. p. 477, n. 4.

[2] The Crusader, Ware, 437.

[3] In Shaw *v.* The Lethe, Bee, 424, and McCulloch *v.* The Lethe, Bee, 423, it was decided that freight has no connection with the *quantum* of wages. It was argued that, peace freight only having been earned on the voyage back from Bordeaux, peace wages only ought to be paid, as freight was the mother of wages. The court said that the service or the bargain governed the *amount* of the wages, and earning of freight governed the payment of them. In this case, the outward voyage was during the war, and the homeward voyage was during the peace, but the actual risk of war had been incurred. But in Brice *v.* The Nancy, Bee, 429, the shipping articles had been signed in Jan. 1783; the vessel did not enter the sea until Mar. 20th. On March 3d peace was made. The court said that it was no fault of the men that the ship did not go to sea immediately after the signing of the articles, and therefore they should have wages according to the contract. But as they had incurred no actual risk, they should have only peace wages from March 3d to the completion of the voyage.

These cases appear to be inconsistent. The first seems to us to rest on sounder principles. The rule involved in it, may sometimes work a hardship; but it is founded on the well-known principle, that the contract is not apportionable.

[4] Whether wages are due for the whole voyage, has been, and perhaps is, a vexed question; and it has been decided both ways. In Walton *v.* The Neptune, 1 Pet. Adm. 142, Scott *v.* The Greenwich, id. 155, Jackson *v.* Sims, id. 157, Mr. Justice *Peters* decided that they were due for the whole voyage. The last case was affirmed by Mr. Justice *Washington*, 1 Wash. C. C. 414, and 1 Pet. Adm. 157, n. But Carey *v.* The Kitty, Bee, 235, decided by Mr. Justice *Bee*, and Natterstrom *v.* The Hazard, Bee, 441, decided by Mr. Justice *Davis* of Massachusetts, and Jones *v.* Smith, U. S. C. C., Maryland, 4 Hall, Am. Law Journal, 276, are the other way.

The case of Luscomb *v.* Prince, 12 Mass. 576, we do not consider as an authority either way. The only question was whether the contract was so far an entirety that misconduct operated as a forfeiture of all the wages, and the court held that the contract was not entire, and said: "There is no doubt that the wages of seamen may be apportioned. If they die during a voyage, their representatives are to receive what is due at the time of their death." Further on it is said: "In some cases he would share in all captures made during the cruise, even after his disability; as in case of sickness or death." See Cutter *v.* Powell, 6 T. R. 320.

wages, for any illegal service, is void.[1] As for serving in the slave-trade, if forbidden by law,[2] or in an unauthorized expedition in breach of the neutrality laws.[3] So, an action will not lie by a pilot for services rendered to a vessel of the enemy.[4] We should, however, as to these cases, say that if the nature of the service was unknown to the person doing the service, he should recover.[5]

The right of a seaman to look to the owners of the vessel for his wages, does not cease on an abandonment by them of the vessel and freight to the underwriters,[6] or by a transfer of their interest to third parties in any form.[7] The lien of seamen for their wages attaches to the ship and the freight, and all the proceeds of both or either, and follows them into whose hands soever they may go.[8] It remains, whether the fund from which it should be paid remains entire, or is broken in upon and in part lost.[9] If a ship be seized and condemned, and afterwards restored, and an allowance be made to the owner by way of compensation for freight, these proceeds represent the ship and the freight, and are liable to this lien as such.[10] Nor does a sale,[11] even if made by order of

[1] The Langdon Cheves, 2 Mason, 58.

[2] The St. Jago de Cuba, 9 Wheat. 409; The Vanguard, 6 Rob. Adm. 207.

[3] The Leander, Edw. Adm. 35.

[4] The Benjamin Franklin, 6 Rob. Adm. 350.

[5] The Malta, 2 Hagg. Adm. 158; Sheppard *v.* Taylor, 5 Pet. 675; Hoyt *v.* Wildfire, 3 Johns. 518. This principle was fully recognized in The St. Jago de Cuba, 9 Wheat. 409, where material-men who had fitted out a vessel, and seamen who had shipped in ignorance of the intended illegal voyage, were held entitled to recover. See also The Mary Ann, Abbott, Adm. 270, where this doctrine was asserted, but the point was not determined, as the court were of the opinion that the crew of a vessel had no right to seize her on suspicion that she was a slaver, and bring her home, although they acted in good faith in so doing.

[6] Brooks *v.* Dorr, 2 Mass. 39; Brown *v.* Lull, 2 Sumner, 443.

[7] Sheppard *v.* Taylor, 5 Pet. 675.

[8] Brown *v.* Lull, 2 Sumner, 443.

[9] Pitman *v.* Hooper, 3 Sumner, 50, 286.

[10] In the case of Brown *v.* Lull, 2 Sumner, 443, Lull shipped as mariner on board the "Two Betseys," which was taken in the port of Naples and condemned. Under the treaty of indemnity, $4,000 was allowed to the owners for the brig, and $5,640 for freight, as an indemnity for his losses. A clause in the shipping articles stipulated that if the brig was detained 30 days at any time, the wages should cease during that time. This clause was disregarded by the court. Judge *Story* laid down the law as follows: "Some principles, applicable to the present case, are now so clear that they need only be stated, although, at a former time, they were subject to many learned doubts. The

[11] The Ship Mary, 1 Paine, C. C. 180; The Margaret, 3 Hagg. Adm. 238.

court under the law of foreign attachment, avoid this lien, but admiralty will still enforce it. For, it is now quite settled, that

capture of a neutral ship does not of itself operate as a dissolution of the contract for mariner's wages, but, at most, only as a suspension of the contract. If the ship is restored and performs her voyage, the contract is revived, and the mariner becomes entitled to his wages; that is, to his full wages for the whole voyage, if he has remained on board and done his duty; or if, being taken out, he has been unable, without any fault of his own, to rejoin the ship. If the ship is condemned by a sentence of condemnation, then the contract is dissolved, and the seamen are discharged from any farther duty on board, and they lose their wages unless there is a subsequent restitution of the property, or of its equivalent value, upon an appeal or by treaty, with an allowance for freight, in which event their claim for wages revives. In the case of a restitution in value, the proceeds represent the ship and freight, and are a substitute therefor. If freight is decreed or allowed for the whole voyage, the mariners are entitled to wages for the whole voyage; for the decree for freight in such a case, includes an allowance of the full wages, and consequently creates a trust or a lien to that extent thereon, for the benefit of the mariners. If the freight decreed or allowed is for a part of the voyage only, the seamen are ordinarily entitled only to wages up to the time for which the freight is given, unless under special circumstances; as where they have remained by the ship, at the special request of the master, to preserve and protect the property of all concerned."

Full wages were given in this case to the time of the mariners' return home, notwithstanding the whole indemnity had not been paid. It is said (on page 452), "The next and last objection which has been made is, that the respondents have received certain instalments only of the sums awarded under the treaty, and not full payment. It is admitted that they have received far more than is sufficient to pay all the wages of the seamen, and that is sufficient to dispose of this objection. The wages of seamen attach as a lien to the ship and freight and their proceeds, into whosesoever hands they may come, as a claim or privilege, having a priority to be satisfied before all other claims. As it has been sometimes expressively said, they are nailed to the last plank of the ship. The ship is a pledge for the payment, while a single fragment remains of the wreck or of its proceeds."

In Pitman *v.* Hooper, 3 Sumner, 50, the libellant sued for wages earned on board a ship which was captured by the Danes; and an indemnity of about two thirds the value of the ship and cargo was given. The question for the court to decide was whether the wages were to be paid *pro rata*, in the same proportion as indemnity was received, or fully. The court held that full wages were due, as the seamen had a priority of payment for their wages.

In Sheppard *v.* Taylor, 5 Pet. 675, the proceeds of ship and freight, but not of the cargo, were held liable, although the same had been assigned to assignees prior to this suit; and it was held that the assignees were entitled to retain from the fund a proportion, *pro rata*, of the disbursements and expenses, which had been actually incurred by them in prosecuting their claim before commissioners under a treaty with the government which seized the vessel, and also a commission of two and a half per cent. as a compensation for their services in and about the prosecution. But it was held that the owners of the vessel were not entitled to deduct any thing for their services in obtaining the restoration. The court having ordered the case to be sent back to the circuit court to determine the amount due the seamen, the assignees petitioned that they might offer in evidence the record of the proceedings in the circuit court, sitting as a court of

if a vessel is under attachment by process from a State court, the lien cannot be enforced as long as the vessel remains in the custody of the officer of the State; but as soon as the attachment is dissolved, or the vessel sold under it, admiralty process may issue, and the vessel is liable *in rem*, notwithstanding the sale.[1] But where the seaman is also part-owner and the vessel has been sold on execution against the owners, it is held that the lien of the part-owner if he ever had one, no longer exists.[2]

And if a ship be bottomed or hypothecated, the lien of the seamen for wages prevails over the bond, for the same reason that makes a later bond for bottomry prevail over an earlier; for the later saved the ship, and the service of the seamen saved it for all who claim under bonds or liens.[3] This lien does not depend upon possession, like a common-law lien, but is rather the *privilegium* of the civil law; nor is it lost when possession is gone; but it may be lost by such delay as indicates waiver, or amounts to negligence.[4]

The lien is not lost, because the seaman receives a master's order on the owner or charterer for his wages.[5] Nor even by his receiving a negotiable note for his wages, unless he is distinctly told that such will be its effect; nor even then, unless something is given him by way of security or other advantage or compensation for giving up his lien.[6] Nor is a receipt in full any thing more than *primâ facie* evidence; nor does a seal make any difference in admiralty.[7]

chancery, in relation to the fund in question, in which the money received by them was by order of court, paid into court, and by a decree of the court, distributed among several claimants. The court granted this petition, reserving to the circuit court the full right and liberty to judge whether the same suits, or either of them, were properly admissible, or competent as evidence in any matter before the court in the further proceedings in the cause.

[1] The Bark Havana, U. S. D. C., Mass., 1858, 22 Law Reporter, 150; Clark *v.* The Gazelle, same court, 1858. See also, ante, p. 523, n. 1.

[2] Gallatin *v.* The Pilot, 2 Wallace, C. C. 592, overruling Foster *v.* Steamboat Pilot No. 2, 1 Newb. Adm. 215.

[3] See cases ante, Vol. I. p. 430, n. 1.

[4] See post, Book IV., on Admiralty Practice, ch. 2, § 1.

[5] The Eastern Star, Ware, 185. But if the seaman is offered money and prefers a bill of exchange upon the owners in order to send the money home, he cannot afterward, on the owners becoming bankrupt, proceed against the vessel *in rem*. The William Money, 2 Hagg. Adm. 136.

[6] The Betsey and Rhoda, Daveis, 112.

[7] See cases ante, Vol. I. p. 447, n. 1.

By our statutes, fishermen on shares have also a lien for their shares.[1] And it exists against the government in all cases where they are proprietors of the ship by purchase, forfeiture, or otherwise, against private persons,[2] and possibly in all cases where they own ships and employ them for merely civic purposes. So, it is held, that this lien is possessed by seamen on board a letter of marque;[3] but not by those on board public ships of war, domestic, or foreign.[4] It has been doubted, whether a vessel in the service of government as a post-office packet, could be arrested in a suit for wages, on account of the detriment to the public service which would be occasioned thereby.[5]

The pilot, engineers, firemen, and deck-hands on board a steamboat, are seamen and have this lien,[6] and so would all persons serving in a way, either essentially or materially and directly useful to the navigation of any vessel; as pursers,[7] stewards,[8] cooks,[9] ship-carpenters,[10] coopers on whaling voyages,[11] and indeed, all officers of a vessel, except the master.[12] Whether a surgeon or physician may sue in admiralty for his wages, is not,

[1] In respect to the lien of mariners generally by statute, see act of 1790, ch. 29, § 6, 1 U. S. Stats. at Large, 133. The act of June 19, 1813, ch. 2, § 2, 3 U. S. Stats. at Large, 2, provides that the vessel shall be liable for six months after the fish caught on board the vessel during the voyage, "shall be delivered to the owner or to his agent for cure, and shall be sold by said owner or agent."

[2] The St. Jago de Cuba, 9 Wheat. 409. See also, United States *v.* Wilder, 3 Sumner, 308.

[3] Ellison *v.* Ship Bellona, Bee, Adm. 112.

[4] De Moitez *v.* The South Carolina, Bee, Adm. 422.

[5] The Lord Hobart, 2 Dods. 100. The post-office department acquiesced in the jurisdiction, and the point was not therefore determined.

[6] Wilson *v.* The Ohio, Gilpin, 505.

[7] Alleson *v.* Marsh, 2 Vent. 181; The Prince George, 3 Hagg. Adm. 376.

[8] Black *v.* Ship Louisiana, 2 Pet. Adm. 268; Smith *v.* Sloop Pekin, Gilpin, 203.

[9] Turner's case, Ware, 83. See Allen *v.* Hallet, Abbott, Adm. 573.

[10] Wheeler *v.* Thompson, 2 Stra. 707; Creed *v.* Mallet, Fortes. 231. In Sheridan *v.* Furbur, 1 Blatchf. & H. Adm. 423, Mr. Justice *Betts* held, that a ship carpenter ranked as an ordinary seaman, and was bound to perform the duties of one, when so commanded by an officer. See also, Dana's Seaman's Friend, 154.

[11] Macomber *v.* Thompson, 1 Sumner, 384. No question as to the jurisdiction was made.

[12] As the mate. Bayly *v.* Grant, 1 Salk. 33, Holt, 48, *nom.* Baily *v.* Grant, 1 Ld. Raym. 632; Hook *v.* Moreton, 1 Ld. Raym. 397. See also, ante, Vol. I. p. 449, n. 1. And the boatswain. Alleson *v.* Marsh, 2 Vent. 181; Ragg *v.* King, 2 Stra. 858.

perhaps, entirely settled by authority. On principle, we should say he had this right.[1] So a woman, if she performs a seaman's work, may sue as seaman.[2] Mere landsmen on board the vessel have no lien, because the service they perform is not maritime;[3] as, for example, barbers.[4]

So musicians, hired as such, and employed only as such, have

[1] The question was raised but not decided in Maddox *v.* ———, 12 Mod. 526, decided in 1700. In 1754, the question came again before the king's bench, on a motion for a prohibition, and the court were of the opinion, that a surgeon was a mariner and might sue in the admiralty. Mills *v.* Long, Sayer, 136. See also, The Wharton, 3 Hagg. Adm. 148, note, decided in 1761, where it incidentally appears that the vessel was arrested and sold for wages due to the surgeon. In The Lord Hobart, 2 Dods. 100, 104, decided in 1815, Sir *William Scott* expressed a very strong doubt, whether an action would lie in such a case, though the point was not decided. He also said it was certain, that he could not sue in the admiralty for medicines furnished to the crew. The case of Mills *v.* Long, was evidently not brought to the notice of the court. In Gardner *v.* The New Jersey, 1 Pet. Adm. 223, 232, the claim of a physician was refused, even out of the remnants and surplus in the hands of the court. But there are *dicta* in favor of the right, by Mr. Justice *Hopkinson*, in Trainer *v.* The Superior, Gilpin, 514, 516; Thackarey *v.* The Farmer, Gilpin, 524, 531, 534, and no objection was taken to the jurisdiction in Shaw *v.* The Lethe, Bee, 424. In this conflict of opinion, it may be well to examine the reasons upon which the decisions and *dicta* rest. Mills *v.* Long, was decided on the ground that the surgeon was under the command of the master and as much obliged, if called upon by the master, to assist in navigating the ship as the carpenter. Sir *William Scott's* doubt, rests on the assumption that the surgeon is not obliged to render such services, and we suppose at the present day, that the surgeon takes no part in the navigation of the vessel. Mr. Justice *Peters* gives no reason for his opinion, but states it as a matter about which there is no doubt. We think, however, that the true reason for sustaining the jurisdiction in such a case, is stated by Mr. Justice *Hopkinson*, in the cases above referred to, to be the nature of the service which the surgeon renders in attending to the health of the crew and ministering to the sick, as a carpenter is required for the preservation and repair of the ship in case of accident, and the cook and steward to feed the crew. And in Ross *v.* Walker, 2 Wilson, 264, decided in 1765, there is a *dictum* that a surgeon may sue in admiralty, because he preserves those who preserve the ship.

[2] See The Jane and Matilda, 1 Hagg. Adm. 187; Wolverton *v.* Lacey, U. S. D. C., Ohio, 18 Law Reporter, 672; Sageman *v.* Sch. Brandywine, 1 Newb. Adm. 5. Lord *Stowell*, in the case first cited, entertained the suit with much reluctance, on the ground of the tendency to immorality which the presence of a female on board in that capacity would create. But his objections would apply more strongly to the hiring of a female, than to her claim for wages after she had performed her duty.

[3] Packard *v.* The Louisa, 2 Woodb. & M. 48. See also, ante, Vol. I. p. 489.

[4] In Thackarey *v.* The Farmer, Gilpin, 524, 534, *Hopkinson*, J., said: "If the master should take with him a servant, whose sole business should be to shave him or comb his hair; or another to amuse him with a violin, the service would be performed on the high sea, but would it be a maritime contract or service, for which the ship could be libelled and attached in the admiralty; or her owners be personally responsible by any process?"

no lien,[1] nor had persons employed on board a vessel which was used to carry wood to Philadelphia from a point on the Delaware bank of the river, nearly opposite the city.[2] But a libel will be sustained for seamen's service on board vessels which go between ports of adjoining States, or from port to port even in the same State;[3] but not, as it seems, on board ferry-boats, or tugs or lighters employed in ordinary traffic along our shores.[4]

[1] Trainer *v.* The Superior, Gilpin, 514. The libellants in this case were employed as musicians on board a museum boat which went from State to State.

[2] Thackarey *v.* The Farmer, Gilpin, 524.

[3] Smith *v.* The Sloop Pekin, Gilpin, 203. In the case of The Coal Boat D. C. Salisbury, Olcott, Adm. 71, the boat was of forty-four tons burden, enrolled and licensed as a coaster, and was employed in transporting coal from Philadelphia to New York by the way of the Delaware river and the Raritan canal and river. She was towed by steamboats to, through, and from the canal, and the men on board performed no other service in her navigation on tide waters than aiding in steering her at particular times of tide, and occasionally at particular points on the passage. It was held that as the service was principally on tide waters, the court had jurisdiction of the case, and would enforce a lien for wages.

[4] In Thackarey *v.* The Farmer, Gilpin, 524, the general question as to the rights of seamen in certain small craft, was fully considered. The court held that a contract for the payment of labor on board of a vessel employed in carrying fuel to the city of Philadelphia from the opposite shore of the Delaware River, cannot be enforced by a suit *in rem* in the admiralty. It was strongly contended that this fell within the definition laid down in The Thomas Jefferson, 10 Wheat. 428. And so it would seem. But the judge held, 1st, that the strong and pointed language of the definition which laid down tide waters as the guide to the jurisdiction, must be considered with reference to the case itself, that point being especially under consideration; and 2d, that a great abuse had been going on of this definition, so that every cockleshell considered itself a ship, and every farmer who brought produce to the market at Philadelphia, thought himself a navigator of the vasty deep. He therefore said that ferry-boats, and such as are engaged in ordinary traffic along our shores, are not within admiralty jurisdiction. The decision has been acquiesced in, and is cited with approval, by *Kent* in Vol. I. p. 379, n.

In Packard *v.* The Louisa, 2 Woodb. & M. 48, 53, where the libellant was engaged in a small vessel which carried stone from Quincy to Boston, and helped lay the stone as well as to navigate the vessel, though the claim of the seaman was really denied on the ground of too long delay, yet from what the court said, the nature of the employment was probably considered enough to take it out of admiralty. "It is doubtful, therefore, whether Packard's employment on board of The Louisa, partly in loading and laying stone, or the business of the sloop herself, could be regarded strictly as maritime and commercial. It seemed to be not wholly that of the sailor, whose services in and for the ship, and whose reckless character in ocean dangers, have made the law indulge him with this additional security." But in the case of The Sloop Canton, U. S. D. C., Mass., 21 Law Reporter, 473, where the vessel was engaged in a similar employment, Mr. Justice *Sprague* held the vessel liable for the wages, on the ground that the persons engaged on board must have been possessed of some skill in naviga-

And a libel will be sustained for service as seamen in fitting out a vessel, which does not go to sea, the voyage being given up by the owners.[1] If a seaman, after the voyage is finished, remains on board, as watchman or keeper, or in any such capacity, he cannot sue in admiralty for the wages of this service, as seaman.[2] But if the voyage is not ended, but only temporarily delayed, and the seaman not discharged, it is a continuing service in the capacity of seaman.[3] And perhaps if his wages as seaman had not been paid, and he libelled the owners for them, the court having jurisdiction, would have included all that was due to him for further service.[4] It has been held that an

tion. "They must," said the learned judge, "have steered, furled, and reefed the sails, and brought the vessel to anchor. They must have been able to hand, reef, and steer, a common criterion of ordinary seamanship. They ought also to have known the rules of navigation in regard to collisions, and had they negligently run afoul of another vessel, the owners of this sloop would have been held responsible for the damage. I cannot hold that the duties which these libellants performed were merely those of landsmen." It was shown that the stones when taken out of the vessel were laid by the crew, in order so as to make a wharf. It was held that this was but a way of unloading the vessel, and was but subsidiary to the principal business. See also, note 4, *infra*.

[1] Wells *v.* Osman, 2 Ld. Raym. 1044, 6 Mod. 238.

[2] See Phillips *v.* The Thomas Scattergood, Gilpin, 1. It did not clearly appear in this case whether the libellant had been regularly discharged or not, but the court held that this made no difference; that as the voyage was ended for which the libellant had shipped, he was at liberty to depart, and that if he was afterwards employed to watch the ship, it was not in continuation of his former service, and, not being of a maritime nature, no suit would lie in admiralty. See also, Graham *v.* Hoskins, Olcott, Adm. 224.

[3] Pitman *v.* Hooper, 3 Sumner, 50; Brown *v.* Lull, 2 id. 443. See The Saratoga, 2 Gallis. 164.

[4] We infer this from the cases in the last preceding notes, although the precise point has not been, so far as we know, directly decided. But it is very clear that the seaman may recover his wages, although during part of the time he performed services which were not strictly maritime in their nature. See The Jane and Matilda, 1 Hagg. Adm. 187. And it would clearly seem that he could do so, although the voyage was ended, if he was retained on board and his original wages were not paid. In the case of The Sloop Canton, U. S. D. C., Mass., 21 Law Reporter, 473, part of the service was the laying of stone in the building of a wharf. It was urged that this was not a maritime service, but Mr. Justice *Sprague* held that it was so far connected with and subservient to the maritime service of navigating the vessel, that the whole might be deemed maritime. The learned judge stated the general rule thus: "If the contract is for the navigation of tide waters and the transportation of merchandise thereon, and the laying stone, which constitutes the cargo of a vessel, into the wall of the wharf as it is discharged, is merely incidental and subsidiary to the principal business, the whole service may be considered maritime. But if, on the contrary, the navigation is merely incidental and subsidiary to the principal business of the owner or hirer of the vessel,

assignee of the wages of a seaman cannot maintain an action *in rem* in the admiralty.[1]

An embargo neither destroys nor suspends the right to wages, if the voyage be afterwards completed, or a new one be substituted for it.[2] But if the embargo is never remitted, that is, if it be in fact a seizure or arrest, and if the voyage is broken up by it without the fault of the owner or his servants, then it puts a stop to the claim for wages, like any other extraordinary termination of the voyage.[3] And if, in the course of the outward voyage, a vessel be seized, and carried out of her way and detained, and afterwards resumes and completes her voyage, and arrives at her port of delivery, the seaman is entitled to his wages for the whole time of such detention, although the ship be lost on the return voyage.[4] So if the ship be recaptured; deducting, however, a proper sum for salvage;[5] and if ransom be paid, an allowance or deduction should be made for that.[6] But where a ship is captured and released, seamen are not bound to contribute to the expenses except in a case of ransom.[7]

Generally, the seamen taken out of a captured ship, which is afterwards released and performs her voyage, have their full wages, deducting, however, what other wages they may have

such, for example, as the transportation across a river of the stone to be used by him in the construction of a building upon which he is engaged, then the contract as a whole would not be maritime." See also, McCormick *v.* Ives, Abbott, Adm. 418.

[1] Patchin *v.* The A. D. Patchin, U. S. D. C., Northern District of New York, 12 Law Reporter, 21.

[2] Marshall *v.* Montgomery, 2 Dall. 170. See also, cases ante, Vol. I. p. 219, n. 1. If the seamen are taken out of the ship during the embargo, they are entitled to recover wages for the time they are thus absent against their will, as well as for the time they are on board. Delamainer *v.* Winteringham, 4 Camp. 186; Beale *v.* Thompson, 3 Bos. & P. 405, 4 East, 546, 1 Dow. 299.

[3] The Saratoga, 2 Gallis. 164.

[4] Hooper *v.* Perley, 11 Mass. 545, 548, per *Jackson*, J.

[5] Hart *v.* The Littlejohn, 1 Pet. Adm. 115; Howland *v.* The Lavinia, 1 Pet. Adm. 123. In Bergstrom *v.* Mills, 3 Esp. 36, full wages were allowed, the point as to deduction for salvage not being taken. But in The Friends, 4 Rob. Adm. 143, it was held that a recapture which did not restore the seaman to his vessel, did not revive the right to wages which was lost by the capture. This, however, is opposed to the American cases above cited.

[6] Girard *v.* Ware, Pet. C. C. 142. In Chandler *v.* Meade, cited in Wiggins *v.* Ingleton, 2 Ld. Raym. 1211, the ship was captured and ransomed and the seaman was afterwards impressed. It was held that he was not entitled to wages unless an usage to this effect was shown.

[7] The Saratoga, 2 Gallis. 164.

earned.[1] But if a neutral seaman be taken from a ship by impressment and never rejoin her, he has only *pro rata* wages.[2] And it has been held that if a seaman is, in pursuance of an act of the legislature, taken from the ship and sent home as a witness in a criminal proceeding, he is only entitled to wages up to the time when he was so forced to leave, although he was in no way in fault.[3]

If a ship sails to several places, but is lost before the voyage is fully completed, wages are due to the last port of delivery, or, as we should hold, to her last port of arrival, and also for half the time she lies in that port, the other half being considered as belonging to the subsequent voyage on which she was lost, and therefore the wages for that voyage were not earned.[4] So a

[1] Singstrom *v.* The Hazard, 2 Pet. Adm. 384; Brooks *v.* Dorr, 2 Mass. 39; Wetmore *v.* Henshaw, 12 Johns. 324; Willard *v.* Dorr, 3 Mason, 91, 161. See the long contested case of Beale *v.* Thompson, 3 Bos. & P. 405, 4 East, 546, 1 Dow. 299.

[2] In Watson *v.* The Brig Rose, 1 Pet. Adm. 132, it was decided that a seaman impressed and not permitted to rejoin his ship, could not recover wages for the whole voyage; because the impressment was a personal wrong done to himself; capture being a misfortune to which he is subject as a citizen of a certain country. The difference between impressment and capture of a neutral, is not very clear, unless it be that the whole crew, whether taken out or not, are tied to the fate of a neutral vessel taken in for adjudication. The whole crew, however, may be said to be liable to impressment. And the fact that one member was selected for this outrage (impressment), differs from the fact that one member is selected for the commission of a scarcely more justifiable act (taking out of a neutral vessel, which is sent in for adjudication), in form rather than in substance. This decision seems almost wanting in the indulgence usually shown to seamen who have been separated from the voyage. In Wiggins *v.* Ingleton, 2 Ld. Raym. 1211, a seaman who had been impressed recovered but *pro rata* wages.

[3] Melville *v.* De Wolf, 4 Ellis & B. 844, 30 Eng. L. & Eq. 323.

[4] The general principle stated in the text has seldom been disputed, and the only question has been, whether wages should be allowed for half the time the vessel was at her last port. In Anonymous, 1 Ld. Raym. 739, it was held, that in case of capture, wages were allowed to the last port of delivery, and half the time of unlading there. And in Jones *v.* Smith, 4 Hall's Am. Law Journal, 276, wages were allowed to the day which was intermediate between the day when the vessel was unladen and the time of her sailing. But the rule generally followed in this country, is to take half the time at the last port of delivery, or destination, whether the unloading occupied half the time or not, evidence being considered not to be admissible to show the exact time taken in unloading, for the purpose of rebutting this presumption. Hooper *v.* Perley, 11 Mass. 545. See also, Bordman *v.* Brig Elizabeth, 1 Pet. Adm. 128, 130; Johnson *v.* The Lady Walterstorff, 1 Pet. Adm. 215; Cranmer *v.* Gernon, 2 Pet. Adm. 390; Galloway *v.* Morris, 3 Yeates, 445. In 1835, however, Mr. Justice *Hopkinson* considered that these cases were erroneously decided, and held that wages were due only up to the time of the discharge. Bronde *v.* Haven, Gilpin, 592. See also, Smith *v.* The

port of destination is a port of delivery so far as wages are concerned,[1] and they are earned if the ship goes there in ballast.[2]

No special contract between the owner and freighter, varying the obligation to pay freight from that implied by the general law, has any effect upon the wages, for these are due whenever freight *is* or *might be* earned.[3] A voyage may, however, be so far an entirety that wages will not be earned until the ship arrives at her final port of destination.[4]

Stewart, Crabbe, 218. But in 1838, the whole subject was thoroughly reviewed by Mr. Justice *Story*, and the old rule affirmed. Pitman *v.* Hooper, 3 Sumner, 286.

[1] In Giles *v.* Brig Cynthia, 1 Pet. Adm. 203, a port of destination is said to be a port of delivery when a vessel goes there to obtain a cargo by funds or credits there, or by goods, money, or bills sent in and with the ship. In Marshall *v.* Montgomery, 2 Dall. 170, the plaintiff shipped on a voyage from Philadelphia to Havana, thence to Cadiz, and thence back to Philadelphia. The vessel was detained at Havana for some time by an embargo. A plan being formed to seize New Providence, a proposal was made to the vessels in port to join in the expedition, to which the captain and crew of the vessel in question assented. The vessel was to receive a specified compensation and to be freed from the embargo. She sailed, and New Providence was taken; she then started for Philadelphia, and was captured on the way. The court held, that New Providence might be considered as a port of delivery, and that the plaintiff was entitled to wages to the arrival at that place.

[2] Giles *v.* Brig Cynthia, 1 Pet. Adm. 203; The Two Catharines, 2 Mason, 319. The vessel in this latter case, went from Newport to Gibraltar, there landed a cargo and went in ballast to Ivica for salt, and, after taking it on board, sailed for home. It was contended, that wages were only due to Gibraltar, on the ground that the outward voyage ended there, but the court held, that wages were due to Ivica, and half the time the vessel was there. See also, Millot *v.* Lovett, Sup. Jud. Ct., Mass., 1800, 2 Dane, Abr. 461. But in Thompson *v.* Faussat, Pet. C. C. 182, *Washington*, J., held in a similar case, that wages were not due for the intermediate voyage.

[3] Anonymous, 1 Pet. Adm. 191, note; Pitman *v.* Hooper, 3 Sumner, 50, 286; Blanchard *v.* Bucknam, 3 Greenl. 1.

[4] The Lady Durham, 3 Hagg. Adm. 196. The vessel in this case sailed on a trading voyage from Liverpool to Africa, and back. She arrived off the coast of Africa, bartered away most of her outward cargo, and had nearly all of her homeward cargo on board, when she was lost. It was held that no wages were due. In Hernaman *v.* Bawden, 3 Burr. 1844, it was held that a voyage from Barnstaple to Portugal in Spain, taking in a cargo of fish at Newfoundland, was an entire voyage, and that Newfoundland was not a port of delivery, but the loading port of the cargo which was to produce the profit of the voyage. Mr. Justice *Peters*, in Giles *v.* Brig Cynthia, 1 Pet. Adm. 203, 205, seems to suppose that this case rests on the ground that the fish were to be caught off the banks of Newfoundland, "where the ocean and not a port of delivery afforded the prey;" and that "there had been no delivery, or any contemplated sale or purchase." We are, however, unable to find any thing in the facts of the case, as reported, which shows that the fish were to be caught rather than purchased at Valentia, to which place the case finds that the ship went; and the case seems to turn entirely on the point that there was no port of delivery except in Spain. In Anonymous, 1 Pet.

If the ship be lost on her outward voyage, and part of the freight have been paid in advance, under such terms that the shippers cannot receive it back, the seamen have not full wages, but in proportion to the freight paid.[1]

The effect of stipulations on the part of the seamen, not to demand wages until the arrival of the vessel, we have already considered,— and merely state here that the courts pay but little respect to them, but allow the seamen, in case the voyage is broken up, to recover wages, as if the stipulations had not been inserted.[2]

A seaman cannot insure his wages,[3] nor derive any benefit from the insurance effected by the owners on the ship or freight;[4] nor by a recovery of damages for a loss of the ship by collision.[5]

If the owner pay advance wages, as is generally the case, they belong to the seamen absolutely, and are lost by the owner, whether any subsequent wages are earned or not.[6] But no more wages are earned or due if the ship and cargo are lost in any way before freight is or might be earned, whether this loss occur by capture, collision, fire, wreck, or otherwise.[7]

In case of wreck, or other peril, the seamen are bound to stay by the vessel, and do all that can be done to save her, or her cargo, or as much as can be saved.[8] And if enough is saved

Adm. 205, the ship went from the United States to the North-west coast for furs, destined to Canton. The seamen shipped by the freight; that is, they were entitled to a certain portion of the freight earned. This was held to be an entire voyage from the United States to Canton. The vessel was not successful in obtaining a full cargo on the coast, and called at a port on the way to Canton where skins had been left by a vessel not fit to proceed. These were carried on freight to Canton. Held that the seamen were entitled to a proportion of the whole freight, as well on the furs obtained on the coast as those taken in at the intermediate port.

[1] Anonymous, 2 Show. 283.

[2] See ante, Vol. I. p. 446, n. 3.

[3] See ante, p. 89, n. 1.

[4] The Lady Durham, 3 Hagg. Adm. 196; M'Quirk *v.* Ship Penelope, 2 Pet. Adm. 276; Icard *v.* Goold, 11 Johns. 279.

[5] Percival *v.* Hickey, 18 Johns. 257, 290.

[6] The Mentor, 4 Mason, 102.

[7] See cases *passim*, and The Niphon, U. S. C. C., Mass., 13 Law Reporter, 266. We would particularly call the attention of the reader to the learned argument of the counsel for the libellants, in this case, in support of the proposition that the maxim that "Freight is the mother of wages," had its origin in the common-law courts of England, and is to a great extent disregarded in the decisions of the present day.

[8] In all the cases in which this subject is alluded to, this rule is laid down. Among

from the ship, or perhaps from the cargo, they are allowed their wages under that name, or as salvage.[1] This question whether seamen are entitled to compensation in the nature of salvage or as wages, is important in many particulars and not one of a mere verbal difference. If compensation is given as wages, the maxim that "freight is the mother of wages" is overridden. If the seamen are entitled as salvors, the well-settled principle that salvors are mere volunteers, persons who owe no duty to the subject saved, is disregarded; for it is settled that the duty of the seamen to remain by the ship is not at an end on the occurrence of a shipwreck, but that they are bound under the contract to save as much of the vessel as possible. If we term the compensation salvage, then the seamen must aid in preserving the property;[2] and they are entitled to compensation from the proceeds of the cargo, as well as from the ship and freight.[3] Whereas, if the compensation is to be given as wages, then, as the seamen have no claim on the cargo for wages, they are not entitled to compensation, although they save some of it.[4] But, on the other

the leading cases which assert it, are Relf *v.* The Maria, 1 Pet. Adm. 186; Taylor *v.* The Ship Cato, 1 Pet. Adm. 48; Clayton *v.* The Harmony, 1 Pet. Adm. 70; Giles *v.* Brig Cynthia, 2 Pet. Adm. 203; Jurgenson *v.* The Snow Catherina Maria, 2 Pet. Adm. 424; The Saratoga, 2 Gallis. 164; Lewis *v.* Elizabeth and Jane, Ware, 41; Pitman *v.* Hooper, 3 Sumner, 50; The Dawn, Daveis, 121; Adams *v.* The Brig Sophia, Gilpin, 77; Wood *v.* The Brigantine Nimrod, Gilpin, 83.

[1] In The Two Catherines, 2 Mason, 319, Mr. Justice *Story* considered the right of compensation to be by way of salvage, and allowed a sum equal to the amount of wages to the time of process, the vessel not having reached her port, but the seamen having been discharged from further duty. See also, Cartwell *v.* Ship John Taylor, 1 Newb. Adm. 341. The Niphon, U. S. C. C., Mass., 13 Law Reporter, 266. This question was considered at length in the case of The Neptune, 1 Hagg. Adm. 227, and the right of the mariner to compensation was held to depend on his contract, and not upon salvage, or a *quantum meruit*.

[2] Adams *v.* The Brig Sophia, Gilpin, 77. It was held in this case not to be sufficient to sue on the shipping articles, but the court said that two things must occur, the saving of the property and its preservation by the services and exertions of the seamen; and that if the libel states the loss it must go further and state the facts which give the right to recover notwithstanding the loss. It was also said to be sufficient if nothing was said in the libel concerning the loss.

[3] Jurgenson *v.* The Snow Catharina Maria, 2 Pet. Adm. 424; The Dawn, Daveis, 121; Taylor *v.* The Ship Cato, 1 Pet. Adm. 48; Brackett *v.* The Hercules, Gilpin, 184; Dunnett *v.* Tomhagen, 3 Johns. 154. In The Dawn, *supra*, it was held that where the seamen performed such a service in a foreign country they were entitled to a sum sufficient to take them home.

[4] Dunnett *v.* Tomhagen, 3 Johns. 154; The Lady Durham, 3 Hagg. Adm. 196.

hand, they are entitled to compensation as wages if any part of the ship and freight is preserved, although they took no part in the preservation, if they were merely not requested to do any thing. In other words, the contract of the seamen is not at an end, and if the owner chooses to employ other persons to save the wreck, and does not call on the seamen, their lien still continues;[1] and such would seem to be the case where the seamen are so much disabled by the disaster that they cannot render any assistance, and the wreck is saved by third parties.[2] On the whole, we prefer the construction which makes the right of compensation an exception to the general rule that "Freight is the mother of wages," to that which enables them to sue as salvors. It is, however, clear that if the contract of the seamen is at an end, they may sue as salvors. This subject we shall consider hereafter.

The maxim that freight is the mother of wages does not apply to the case of the master, and, although he cannot sue the vessel *in rem*, yet the owners of the vessel are liable to him for wages in case of capture,[3] or shipwreck,[4] to the time of the dissolution of the contract. And the maxim is also subject to the exception that if no freight is earned because the voyage is broken up on account of the fraud or wrongful act on the part of the master or owner, wages are still due.[5]

[1] Jones *v.* Wreck of the Massasoit, U. S. D. C., Mass., 7 Law Reporter, 522. The vessel in this case was wrecked at the mouth of Boston Harbor. The crew remained on the wreck till the next day, when they were taken off by a life-boat. The owners sent down an agent with a steamboat and men, who saved all of the wreck that was saved, the crew not being called upon to do any work, or furnished with any means of subsistence, and part of the time they were physically incapable of rendering any assistance. It was held that wages were due. See also Bruce *v.* The Tackle, etc., of the Steamboat America, 1 Newb. Adm. 195.

[2] See Jones *v.* Wreck of The Massasoit, cited in note *supra*. In The Reliance, 2 W. Rob. 119, it does not appear why the crew did not assist in saving the proceeds of the wreck, and the case seems to be decided on the broad ground that the crew have a lien on the proceeds of a wreck if saved by third persons. But in Lewis *v.* The Elizabeth and Jane, Ware, 41, where wages are considered to rest on principles of salvage, it was held that where a vessel was *bonâ fide* deserted at sea, and afterwards saved by third parties, the seamen were not entitled to their wages. See also, The Niphon, U. S. C. C., Mass., 13 Law Reporter, 266.

[3] Moore *v.* Jones, 15 Mass. 424.

[4] Hawkins *v.* Twizell, 5 Ellis & B. 883, 34 Eng. L. & Eq. 195.

[5] Hoyt *v.* Wildfire, 3 Johns. 518, where the vessel was seized for carrying contraband goods. See also, 1 Pet. Adm. 192, note; The Neptune, 1 Hagg. Adm. 227, 232. Or

If what is saved from a wrecked vessel is brought home to the United States in another vessel, with the master and seamen, the ship bringing it home has a lien on it for the freight payable for bringing it, but not for the passage money of the seamen.[1]

It has been said at common law,[2] that if the ship be not sea-worthy at the outset of the voyage, and be abandoned for that reason, before freight is earned, no wages are due. But this rule would subject the seaman to lose wages for his services for no fault of his own, but for that which generally is in fact the fault of the owner, and may almost always be supposed to be so, and which the seamen could not by labor or care have prevented. And we think that it would not now be considered as law in admiralty, if anywhere.[3]

It is held that the owner of a slave may sue for his wages;[4]

where the voyage is broken up by a seizure for a debt of the owner of the vessel. Woolf *v.* Brig Oder, 2 Pet. Adm. 261. In Van Beuren *v.* Wilson, 9 Cow. 158, the vessel was seized by civil process from the admiralty court in a foreign country, for the purpose of trying the right of property to the vessel. She was detained several months and then ordered to be restored. This was prevented by a mob, the captain was killed in the affray, and the vessel having become very much deteriorated by decay, was abandoned to the underwriters. The court held that either wages were due, or damages to the amount of his wages, on the ground that a seizure on civil process must be at the risk of the owners, and that they ought to have released the vessel and given security for its return. In The Saratoga, 2 Gallis. 164, 175, *Story*, J., said: "If the voyage or freight be lost by the negligence, fraud, or misconduct of the owner or master, or voluntarily abandoned by them; if the owner have contracted for freight upon terms or contingencies differing from the general rules of maritime law; or if he have chartered his ship to take a freight at a foreign port, and none is to be earned on the outward voyage, in all these cases the mariners are entitled to wages, notwithstanding no freight has accrued." In Oxnard *v.* Dean, 10 Mass. 143, it was held that where a vessel on her homeward voyage was seized and condemned abroad for the breach of the revenue laws of a foreign country, the seamen, although not in fault, were not entitled to wages after the seizure; and it was stated, although the point was not decided, that a majority of the court were of the opinion that no wages were due after the completion of the outward voyage. See note to this case by Mr. Rand, in his edition, p. 151. This case does not seem to be in accordance with the cases cited ante, p. 579, n. 5, to which we refer, and we are inclined to doubt its correctness.

[1] Brackett *v.* The Hercules, Gilpin, 184.

[2] Eaken *v.* Thom, 5 Esp. 6. See the remarks of *Kent*, C. J., on this case, in Hoyt *v.* Wildfire, 3 Johns. 518.

[3] Hindman *v.* Shaw, 2 Pet. Adm. 264, 266, supports the general principle that, the voyage being broken up by the vessel not being sea-worthy, the seamen are to have an allowance. But in this case, the seaman refused to proceed in another suitable ship, which had been provided. The court held this tantamount to desertion.

[4] Carey *v.* Schooner Kitty, Bee, 255; Stone *v.* Godet, cited Bee, 95.

and so may the master of an apprentice.[1] But if the slave escapes during the voyage, no responsibility for indemnity rests on master, owner, or crew, unless they assisted his flight and escape.[2]

As to the question how far and when seamen may be witnesses for each other, the prevailing, and we think the reasonable, rule is, in admiralty as at common law, that seamen may be witnesses for each other in suits for wages, although they may have a common interest in sustaining each other's claims, and defeating the defences made against them.[3] It is always in the power of courts of admiralty at least to determine what weight shall be given to their testimony, and to make due allowance for all the circumstances which weaken its value. But the master has been held (on what seems to us questionable reasons) to be incompetent as a witness for the owner, in a suit against him or the ship for wages, because of his own direct responsibility and interest.[4] However this may be, it would seem clear that where

[1] Eades *v.* Vandeput, 5 East, 39, note.

[2] Carey *v.* Schooner Kitty, Bee, 255. In Emerson *v.* Howland, 1 Mason, 45, it was held that if a slave was illegally discharged abroad, his master might recover wages up to the time when he might have returned to the United States. The slave did not return, but no claim wasmade for his value.

[3] As the contract of seamen is several and not joint, they may be witnesses for each other where they are interested in the same question, if they are not directly interested in the event of the suit. Spurr *v.* Pearson, 1 Mason, 104; Hoyt *v.* Wildfire, 3 Johns. 518; Powell *v.* The Betsey, U. S. D. C., Penn., 2 Browne, 335, 350; The Cypress, Blatchf. & H. Adm. 83. Such evidence is, however, received with great caution and scrutiny. The Steamboat Swallow, Olcott, Adm. 4; Graham *v.* Hoskins, id. 224. It is said in a case in Pennsylvania that where the question is the loss of the ship, embezzlement, equally affecting the whole crew, negligence, misfeasance or malfeasance to which all must contribute in damages, one seaman cannot be a witness for another. Thompson *v.* Ship Philadelphia, 1 Pet. Adm. 210. In a simple case of embezzlement, however, where the seamen, not in fault, are not bound to contribute, this rule does not apply. Spurr *v.* Pearson, 1 Mason, 104. The general rule is the same both at common law and in admiralty, respecting the competency of witnesses. The Schooner Boston, 1 Sumner, 328, 343.

[4] Mr. Justice *Peters* constantly refused to admit the captain to testify in suits for seamen's wages. Malone *v.* The Mary, 1 Pet. Adm. 139, 141; Jones *v.* The Brig Phœnix, id. 201; Atkyns *v.* Burrows, id. 244. The reason he gave was his interest in the result of the suit, he being responsible for the mariner's wages. This appears to have been the practice in Massachusetts, Dunlap's Adm. Practice, 245. But if the mariners have obtained their wages, even by the help of his testimony, from either the owners or the ship, that extinguishes *their* claim; and neither the ship nor the owners can have any claim against him, for he is not liable for seamen's wages except to seamen, and if they have got them from some one else, they cannot get them from him.

he is a party to the suit, or where he has intervened, put in a claim, and filed an answer to the libel, he is incompetent.[1] So he cannot testify to any matter of defence which originates in his own acts, for which he is himself responsible.[2] The master is, however, a competent witness on behalf of the seamen.[3] And charges made against seamen on the shipping papers require to be verified by the oath of the master.[4]

The subject of forfeiture of wages by desertion or other gross misconduct, has been considered in the first volume, to which we refer,[5] and we shall consider hereafter the mode of recovering wages in admiralty.

And if it be said that he has an interest in preventing their recovering against the owners, because, if their judgment is unsatisfied they may turn on him, this seems to us too remote an interest to disqualify the master. This seems to be the view taken of it in The Lady Ann, Edw. 235, where Sir *Wm. Scott* says: "The mariner has his election whether he will proceed against the owners, the master, or the ship; and in this case, the proceedings being instituted against the owners, the master has no immediate interest in the suit, and therefore is not an incompetent witness by any rule with which I am acquainted." In New York the master is admitted as a witness on behalf of the owners. The Steamboat Swallow, Olcott, Adm. 4; The Steamboat Hudson, id. 396. In Galloway *v.* Morris, 3 Yeates, 445, the point was only raised in the argument. It was not decided. But a release from the owners was required. A release was procured from one, which the court ruled to be sufficient, declaring the point open to further discussion. In Arnold *v.* Anderson, 2 Yeates, 93, which was a suit for damages for the unskilful stowage of the cargo, the captain was admitted, on a release being given; the mate and mariners were admitted without any release.

[1] The Exchange, Blatchf. & H. Adm. 366.

[2] The William Harris, Ware, 367, 371. It was also held in this case that a master is not a proper person to prove the sufficiency of a medicine chest. The master under the general rule stated in the text is not competent to prove that a discharge of a seaman was justifiable. Robinett *v.* The Ship Exeter, 2 Rob. Adm. 261; Atkyns *v.* Burrows, 1 Pet. Adm. 244. In The Hope, 2 Gallis. 48, it was held that the master is not a competent witness in case of an information *in rem* for a forfeiture occasioned by his alleged misconduct.

[3] The Trial, Blatchf. & H. Adm. 94.

[4] The David Pratt, Ware, 495.

[5] See ante, Vol. I. 468, 469, 473, n. 1.

CHAPTER VII

OF SALVAGE.

SECTION I.

OF THE GENERAL PRINCIPLES OF SALVAGE.

SALVAGE is eminently a subject for admiralty jurisdiction, and we may state, that it has been decided that no action will lie at common law, unless the salvor can prove a contract with the owner of the property saved or with his agent.[1]

The word salvage is used in two senses; it sometimes means the property which is saved from a wrecked vessel, and frequently has this meaning among insurers and in insurance. But in admiralty, and, generally, in the law-merchant, it means the compensation which is earned by persons who voluntarily assist in saving a ship or her cargo from peril; and we use the word in this last sense in this chapter.

The interest of co-salvors, is not joint but several; and payment or satisfaction to any one, is not so to any other. If, therefore, payment is made to the master, although his receipt would bind himself and his owners, and an action would lie against him by the seamen for their shares,[2] yet it is also true, that the seamen may bring an action against the property saved,

[1] Lipson *v.* Harrison, Q. B. 1854, 24 Eng. L. & Eq. 208. The sailor in this case, was ordered by his captain to leave his vessel, and go in a boat fourteen miles to the assistance of another vessel which was stranded, and to place himself under the command of the captain of the other vessel. It was held, under these circumstances, that he could not maintain an action against the owner of the ship saved, for his services.

[2] The Centurion, Ware, 477.

if the settlement was made with the master without their consent.[1]

The court should not give different parts or parcels of the ship or cargo to different salvors, or different proportions of specific parts;[2] and this, we believe, is never done in this country; but different proportions of, or sums from, the value of the whole property saved. And sometimes a specific sum is given.[3]

A salvor in possession, has a qualified property in the thing saved, whether ship or cargo, or both. And it is not necessary, that he should remain in actual possession, in order to maintain his rights or preserve this qualified property.[4] Nor should he do so, to the detriment of the property or the inconvenience of the master and crew.[5] Salvors cannot be divested of this legal interest in the property saved, until it is taken from them by adjudication in a court of competent authority.[6] The owner does not lose his right of property by the salvage, but it is qualified by the salvor's right,[7] and the interest of the owners is sufficient to entitle them to oppose the claim of a co-salvor.[8]

If the amount claimed by salvors is not too great, the master may relieve his property from their lien by paying them at once. If this be done in the honest exercise of a reasonable discretion, he will be justified.[9] If the demand seems to him exorbitant, he cannot turn the salvors off, but should proceed to the nearest and most convenient port where he may have adjudication. And in selecting his port, he must consult their rights and convenience, as well as his own. Otherwise, they may lawfully resist him and determine for themselves the course of the ship. But this power can exist only in an extreme case.[10]

[1] The Britain, 1 W. Rob. 40; The Sarah Jane, 2 W. Rob. 110. But see 9 & 10 Vict. c. 99, s. 26.

[2] The Vesta, 2 Hagg. Adm. 189.

[3] McGinnis *v.* The Steamboat Pontiac, 1 Newb. Adm. 130, 5 McLean, C. C. 359.

[4] The Maria, Edw. Adm. 175; The Amethyst, Daveis, 20; The Bee, Ware, 332; The Brig John Gilpin, Olcott, Adm. 77; Eads *v.* The Steamboat H. D. Bacon, 1 Newb. Adm. 274.

[5] See The Eleanora Charlotta, 1 Hagg. Adm. 156.

[6] The Blenden Hall, 1 Dods. 414.

[7] The Bee, Ware, 332.

[8] The Blenden Hall, 1 Dods. 414.

[9] See Houseman *v.* Sch. North Carolina, 15 Pet. 40, 45.

[10] See The Houthandel, 1 Spinks, Adm. 25. And after a vessel has been brought

So great is the power of the salvors over a vessel, that it has been held, where a vessel came into collision with another, and all the crew, with the exception of two, escaped on board the other vessel, that a third vessel which fell in with the one thus partly abandoned, was not afterwards obliged to delay her course for the purpose of taking on board again, the crew of that vessel.[1]

As all salvors may join in one libel, they should so join to save expense; and if different libels are filed unnecessarily, the costs will not be charged to the proceeds of the salvage property.[2] But if the parties stand upon adverse rights, as where the salvage has been partly performed by one vessel and completed by another, each may file a libel.[3] But a claim of the ship-owners for freight, or general average, on the property saved, should be made in a separate libel, because this is only a claim on the balance of proceeds after the salvage is paid, and is a claim against the owners of the cargo, with which the salvors may have nothing to do.[4]

Co-shippers should not interfere by a claim of the proceeds for the benefit of other shippers with whom they have no privity of interest, and from whom they have no authority to represent them.[5]

into port by salvors, her owners have no right to take her to another port, without the consent of the salvors. The Nicolai Heinrich, 22 Eng. L. & Eq. 615. Due regard is also to be paid by the salvors to the convenience of the owners, in determining to what port the vessel is to be taken, when the salvage service is performed at sea. The Eleanora Charlotta, 1 Hagg. Adm. 156. In the case of L'Esperance, 1 Dods. 46, a vessel bound from Dantzic to London, struck upon the Lemon and Ower Bank, and was abandoned by her crew. Two days afterwards she was discovered in latitude 53° 17′ N., and longitude 2° 24′ E. by an English sloop-of-war bound to Heligoland, to which place the wreck was towed. Her papers were not on board, and there was no means of telling to what port she was going. The owners contended, that she should have been taken into an English port, but the court held, that the salvors were justified in taking her to Heligoland.

[1] The Orbona, 1 Spinks, Adm. 161.

[2] The Ship Henry Ewbank, 1 Sumner, 400; The Schr. Boston, 1 Sumner, 328. And in Hessian *v.* The Edward Howard, 1 Newb. Adm. 522, the court said it was the duty of salvors in bringing a suit for salvage, to make all the co-salvors parties, in order in one final decree to do full justice to all concerned.

[3] The Ship Henry Ewbank, 1 Sumner, 400, 408. But if separate libels are filed, the actions may be consolidated by the court for its own convenience. The London Merchant, 3 Hagg. Adm. 394; Rich *v.* Lambert, 12 How. 347, 353.

[4] The Sybil, 4 Wheat. 98.

[5] Stratton *v.* Jarvis, 8 Pet. 4.

An appeal, as has been already stated, takes up the whole case, and it will be heard and decided by the appellate court on its merits. But it has been said, that the appellate court is very unwilling to vary the decree of the lower court, in cases of salvage, when the question is merely one of amount or proportion; as it is deemed especially important that cases of this kind should be finally disposed of without delay, if it can be avoided.[1] Yet it is obvious that where a party has a right of appeal given him by law, "he has a right to demand the conscientious judgment of the appellate court on every question arising in the cause," and so it is now held.[2]

When there is an appeal, each claimant, that is, each owner of the property, and not each libellant, is treated as a distinct appellant for his share of the property, and nothing more is in dispute between him and the salvor-libellant, but the amount of the salvage which is chargeable on him.[3] If a settlement is made with several salvors, and the money paid over to their agent, a salvor who is not included in the settlement, is not entitled either at common law or in England under the statutes of 3 & 4 Vict. c. 65, and 9 & 10 Vict. c. 99, to a monition directing such agent to bring the money into court for distribution among all the salvors.[4]

If a vessel while engaged in performing a salvage service, or while assisting another vessel under circumstances which prevent the assistance from being considered as salvage, unintentionally and unavoidably injures such vessel, she is not liable in damages.[5]

[1] Tyson *v.* Prior, 1 Gallis. 133; The Sybil, 4 Wheat. 98. In Hobart *v.* Drogan, 10 Pet. 108, 119, *Story*, J., said: "This court is not in the habit of revising" decrees of the court below "as to the amount of the salvage, unless upon some clear and palpable mistake or gross over-allowance of the court below. It is equally against sound policy and public convenience to encourage appeals of this sort in matters of discretion, unless there has been some violation of the just principles which ought to regulate the subject."

[2] Post *v.* Jones, 19 How. 150, 160. See also, The Thetis, 3 Hagg. 14, 2 Knapp, 390; The Messenger, 1 Swabey, Adm. 191. But in The Clarisse, 1 Swabey, Adm. 129, 134, the Privy Council said: "It is a settled rule, and one of great utility, particularly with reference to cases of this description, that the difference ought to be very considerable to induce a court of appeal to interfere upon a question of mere discretion."

[3] See ante, p. 529, n. 1.

[4] The Tenth of June, 29 Eng. L. & Eq. 585.

[5] Stevens *v.* The S. W. Downs, 1 Newb. Adm. 458.

SECTION II.

WHO MAY BE SALVORS.

The salvage services must be performed by persons not bound by their legal duty to render them.[1] And if such salvors perform such service, and all their acts are legal, the law refuses to inquire very carefully into the motives which influence their conduct; although it cannot be doubted that some inquiry of this kind may sometimes be proper, when the court is considering whether any compensation shall be paid, or if any compensation, what.[2]

It has been made a question, whether persons forcibly taking possession of a vessel against the will of the master, can claim as salvors.[3] But we think it must be obvious and certain, that, on the one hand, the master's reluctance or resistance to the saving of the property under his charge, should not bar the claims of salvors, but rather enhance them, if their services were necessary, or in all respects meritorious and useful.[4] But, on the other, his opposition would be a circumstance of great weight, in determining whether their services were necessary, or meritorious.

It is a question of much importance, who may be salvors; or rather, who may not be, because already bound by legal obligation to render the same service. Thus, a crew, generally, cannot claim as salvors of their own ship or cargo; not only because it is their duty to save her, if possible, but because it would be most unwise to tempt them to let the ship and cargo

[1] The Neptune, 1 Hagg. Adm. 227, 236.

[2] In the case of Le Tigre, 3 Wash. C. C. 567, a revenue officer, who intended to do merely his duty, transcended his authority and seized a vessel, whereby she was saved for the owners. It was held, that the officer was entitled to salvage, although when he seized it, he did it from another motive.

[3] Clarke *v.* Brig Dodge Healy, 4 Wash. C. C. 651.

[4] See The Jonge Bastiaan, 5 Rob. Adm. 322; The Bee, Ware, 332.

get into a position of extreme danger, that then, by extreme exertion, they might claim salvage.[1]

This is certainly, the general rule, and it will be found that the usual exception to it is, where the contract of the seamen is at an end, or the service is so entirely out of the line of their ordinary duty, that it may be considered as not done under their contract.[2]

[1] Miller *v.* Kelly, Abbott, Adm. 564. This question was considered at length by *Curtis*, J., in the case of The Sch. John Perkins, U. S. C. C., Mass., 21 Law Reporter, 87, and in the cases of The Steamer Acorn and The Sch. Speedwell, 21 Law Reporter, 99. The learned judge, on p. 93, said: "Though I am not prepared to deny that cases may arise in which the crew may become salvors of the vessel, it is not easy for me to foresee how such a case can arise, while their contract continues in force." The vessels in these cases were enclosed in a field of ice in a storm, and were temporarily deserted by most of their crews, who intended to return when the gale abated. The alleged salvage services consisted, in one instance, in one of the crew cutting the cable of the vessel to avoid an impending collision with a vessel that was adrift, and in the other case, in avoiding a collision by putting out fenders. Under these circumstances, Mr. Justice *Ware* decreed salvage, 19 Law Reporter, 490, but this decree was reversed in the circuit court, 21 Law Reporter, 87. See also, Beane *v.* The Mayurka, 2 Curtis, C. C. 72, where it was held, that the slipping of a cable by one vessel to prevent a collision, gave no claim to salvage. See also, the case of Mesner *v.* Suffolk Bank, U. S. D. C., Mass., 1838, 1 Law Reporter, 249, where a claim for salvage of property on board, by one of the crew of a vessel which was sinking by reason of injuries received by a collision, was refused, although the circumstances of the case, as Mr. Justice *Curtis* remarks, in the case of The John Perkins, *supra*, "would seem to have involved all the considerations in favor of the claim of one of the ship's company to be a salvor, which could well be presented." In The Star, Vice-admiralty court, Halifax, 14 Law Reporter, 487, two vessels came into collision, and got entangled together by their rigging. All the persons on board The Star, fearing she would sink, went on board the other vessel, soon after the two vessels came into collision. Shortly after this, some of the crew of The Star returned to their vessel, while the vessels were still entangled, and while they were on board, the vessels parted and reached port in safety. The court held, that as the crew did not leave their vessel *animo non revertendi*, their services in bringing the vessel in, were done under their contract as seamen, and that they were not entitled to salvage.

[2] Thus, in the case of The Mary Hale, decided in 1856, Marvin on Salvage, 161, the vessel was wrecked, and the mate and four seamen crossed the gulf-stream in an open boat, a distance of one hundred and eighty miles, to procure assistance to take off the passengers and cargo. They succeeded in their endeavors and were the means of saving the passengers and cargo. The court held, that they were entitled to salvage, on the ground, that their services exceeded the duty they owed to the ship. In the case of The Ship Holder Borden, U. S. D. C., Mass., 10 Law Reporter, 193, the vessel, on a whaling voyage, was wrecked, the master and crew built a schooner out of the materials of the wreck after five months' labor, and saved over a thousand barrels of oil; and then sailed to Oahu, procured a vessel, and brought home the oil in safety. Salvage was decreed.

And where a vessel is in a position of great danger, and a person from another vessel is requested by the owner to take the command as captain, and save the vessel if he can, he is to be considered as a salvor, if no specific agreement is made with him for compensation.[1]

A crew is bound to suppress a mutiny on board their own ship, at all events and at every hazard, and cannot claim salvage therefor,[2] although an admiralty court, where it could, would be disposed to reward seamen for meritorious conduct of this kind; and if a crew of one ship suppress a mutiny or revolt in another ship, or retake it from mutineers or revolters, this may well found a claim for salvage.[3]

If part of a crew leave their ship and go on board another to save it, and thereby acquire a salvage claim, the rest, who remain, share in this claim. Not equally, however; for their claim rests mainly on the increased labor, exposure or peril which falls on them. If they were as willing to go as those who went, then they are entitled to more, in proportion, than if they hung back, and they who actually performed the service were the only ones ready to make the effort or encounter the peril.[4] But it has been held that only those of the crew of a light ship who actually perform a salvage service are entitled to compensation.[5]

If the crew of a ship which has been wrecked, and who are now on board another ship as passengers, as a part of the crew of this

[1] McGinnis *v.* The Steamboat Pontiac, 1 Newb. Adm. 130, 5 McLean, C. C. 359. The libellant in this case, took charge of the vessel while she was in a position of danger in the ice, on the Ohio river. The court admitted the propriety of the general rule, but held, that it could not apply, as the libellant was passenger on board of another boat, and could have had no agency in bringing the Pontiac into the position of danger in which she was placed.

[2] The Governor Raffles, 2 Dods. 14.

[3] The Trelawney, 4 Rob. Adm. 223.

[4] The Mountaineer, 2 W. Rob. 7; The Centurion, Ware, 477, 483. In The Baltimore, 2 Dods. 132, equal salvage was decreed to those who went on board the vessel saved, and to those who remained but were willing to go; and to one who was not willing to go, nothing was given. But it is manifest that as every salvor must be rewarded according to the labor and peril he undergoes, those who leave their own ship should generally be entitled to more than those who remain. See The Jane, 2 Hagg. Adm. 338; The Sarah Jane, 2 W. Rob. 110, 115; The Ship Henry Ewbank, 1 Sumner, 400, 431; The Roe, 1 Swabey, Adm. 84; The Janet Mitchell, 1 Swabey, Adm. 111.

[5] The Emma, 3 W. Rob. 151.

ship, render salvage services to a third ship and property, they are entitled to a share of the salvage.[1]

So it would doubtless be with passengers of any description;[2] but a passenger is not, it has been held, allowed any salvage for services rendered to the ship in which he is, because that is his duty.[3] It is obvious, however, that while this may be generally true, yet, as in the case of a seaman, extraordinary services may give a salvage claim, and certainly the passenger would not be held as bound to all the duty of a seaman;[4] and if his relation as passenger to the ship is dissolved, he may then perform a salvage service.[5] So if a ship be abandoned at sea, and deserted by all her crew save one or two, and there remain on board and save, or help materially in saving the property, they are salvors.[6]

A pilot, acting within the line of his duty, cannot entitle himself to claim as salvor, by any exertions or any service as pilot,

[1] The Salacia, 2 Hagg. Adm. 262, 269. In The Two Friends, 2 W. Rob. 349, occurred the curious case of two vessels being abandoned by their crews at sea, and the crew of the first finding the second vessel and saving her. The court considered that as they thereby saved their own lives, it was a case of mutual benefit, and, the property being worth £1,237, decreed £300.

[2] Bond *v.* The Brig Cora, 2 Wash. C. C. 80; McGinnis *v.* The Steamboat Pontiac, 1 Newb. Adm. 130, 5 McLean, C. C. 359. In The Hope, 3 Hagg. Adm. 423, compensation was allowed to the passengers, on the ground that "they were delayed and experienced some inconvenience."

[3] The Branston, 2 Hagg. Adm. 3, note. See next note.

[4] Newman *v.* Walters, 3 B. & P. 612. In this case the ship was in danger, and the captain and part of the crew left her. A passenger who had been a sea-captain took the command, and, with the aid of the rest of the crew, brought the vessel safely into port. Held that he was entitled to claim salvage. But in the Branston, 2 Hagg. Adm. 3, note, salvage was refused in a case where a passenger on board, a lieutenant in the royal navy, contributed his assistance when the vessel was in distress.

[5] The Two Friends, 1 Rob. Adm. 271, 285; Clayton *v.* Ship Harmony, 1 Pet. Adm. 70.

[6] Mason *v.* Ship Blaireau, 2 Cranch, 240. The decision in this case proceeded entirely on the ground that by the abandonment of the vessel by the captain and crew, the duty of the mariner who had been left on board by accident ceased. In The Florence, Eng. Adm. 1853, 20 Eng. L. & Eq. 607, it was held that if a vessel is abandoned at sea *sine animo revertendi*, the contract of the crew is at an end; and if they afterwards succeed in saving the vessel, they are entitled to compensation as salvors. The learned judge said, however, that he confined his decision to the case of an abandonment at sea, and did not intend that it should apply to leaving the ship on the coast, where there might exist a fair intention of returning. See Taylor *v.* Ship Cato, 1 Pet. Adm. 48. In Montgomery *v.* The T. P. Leathers, 1 Newb. Adm. 421, it was held that where a steamboat which was on fire, was surrendered by the captain to the master of another boat, the contract of a pilot on board was dissolved, and he might be a salvor.

although he may become, like any other person, a salvor, if he performs extraordinary services, outside of the line of his duty. And if persons assume the character of pilots, and act as such, they must be compensated as such, and not as salvors.[1] In England it would appear that formerly extra efforts and exertions on the part of pilots, were compensated as such, and not as salvage.[2] Now, however, pilotage is defined to be "the conducting a vessel into port in the ordinary and common course of navigation," and it is said not to be simple pilotage "when a vessel, from real danger, or from what may afterwards turn out to be an unfounded alarm, is seeking a port of safety, out of the course of her intended voyage."[3] And as the English pilot laws do not provide for any extra compensation, the courts have felt themselves bound to reward all efforts beyond the duty of a pilot, by a compensation as salvage.[4] And it has been held that when pilotage services are performed in a place where there are no licensed pilots, they are to be compensated for as salvage when voluntarily performed by others.[5] But we should not

[1] The Cumberland, 9 Jurist, 191; The Johannes, 6 Notes of Cases, 288. In The City of Edinburgh, 2 Hagg. Adm. 333, the vessel was off the coast in a storm two days, with a signal for a pilot flying. None, however, went to her till the third day, after the storm had abated. They then claimed salvage on the ground that they had signalled the captain to go back on his first entering the harbor, on the first day of the storm, that they had continued on the watch for two nights, and had been prevented from going off only by the violence of the storm. The Trinity Masters being of the opinion that the attempt to go to the vessel should have been made, the court held that no salvage service had been rendered. In The Jonge Andries, 1 Swabey, Adm. 226, 229, Dr. *Lushington* considered the law to be that if a pilot went on board a vessel in distress he might claim as salvor, but that if he were engaged to take the vessel into port he could not claim additional compensation if, in consequence of the weather becoming more boisterous, he should perform additional services. This case was affirmed on appeal, 1 Swabey, Adm. 303.

[2] The Enterprise, and The Columbus, 2 Hagg. Adm. 178, note, decided in 1828. In The Funchal, 3 Hagg. Adm. 386, note, where three smacks piloted a vessel out of an unfrequented channel at the mouth of the Thames to the Nore, on a moonlight night, the vessel being uninjured and preparing to anchor, knowing her situation, it was held that this was a mere pilotage service. See also, The Branken Moor, 3 Hagg. Adm. 373.

[3] The Elizabeth, 8 Jurist, 365. See also, cases in next note.

[4] The Frederick, 1 W. Rob. 16; The Hebe, 2 W. Rob. 246; The Joseph Harvey, 1 Rob. Adm. 306; The Elizabeth, 8 Jurist, 365; The Persia, 1 Spinks, Adm. 166; The Industry, 3 Hagg. Adm. 203, where it is held to be no part of the duty of a pilot to tow a vessel. In The King Oscar, 6 Notes of Cases, 284, and in The Hedwig, 1 Spinks, Adm. 19, the general doctrine was applied to a foreign vessel.

[5] The Rosehaugh, 1 Spinks, Adm. 267.

consider that this would be so if an agreement was made to act as pilot.[1]

In this country, as we remarked in our first volume,[2] the States are authorized by an act of congress to make their own pilotage laws, and questions under these laws are cognizable both in the State and in the United States courts. Most of these laws make it part of the duty of a pilot to assist vessels in distress, and either give the rate of the extra compensation to be awarded, or point out the tribunal which shall determine the amount due. Extra services are, therefore, in this country generally considered as such, and not as salvage services,[3] and this has been so held even where there is no statute law applicable to the case.[4]

In some cases, however, extra services are considered as salvage,[5] even though the pilot could have recovered his extra compensation under a State statute.[6] So an officer of the customs who renders extraordinary assistance, outside the bounds of his official duty, may claim as salvor.[7]

[1] See The Jonge Andries, 1 Swabey, Adm. 226, affirmed on appeal, 1 Swabey, Adm. 303.

[2] Vol. I. p. 479.

[3] Dulany *v.* Sloop Peragio, Bee, 212; Dexter *v.* The Bark Richmond, 4 Law Reporter, 20; Schooner Wave *v.* Hyer, 2 Paine, C. C. 131. And in Callagan *v.* Hallett, 1 Caines, 104, where the vessel was on shore, and the master made an agreement with a pilot to get her off for $500, and take her into port, the court refused to enforce it, on the ground that the pilot was bound to render assistance, and could recover an adequate compensation in the manner pointed out by the statute.

[4] Love *v.* Hinckley, Abbott, Adm. 436.

[5] Hand *v.* The Elvira, Gilpin, 60.

[6] Hobart *v.* Drogan, 10 Pet. 108. In New York some importance seems to be attached to the question whether the vessel is afloat at the time of the service rendered. Thus in Lea *v.* Ship Alexander, 2 Paine, C. C. 466, it was held that where a vessel is on a shoal and is got off by a pilot, he is entitled to claim salvage, on the ground that it is not in the line of the duty of a pilot to do more than navigate a vessel when she is afloat. For no other reason could salvage have been refused in the case of Schooner Wave *v.* Hyer, 2 Paine, C. C. 131. In this case the vessel while going out of the harbor in winter was injured by the ice, and when near Sandy Hook was nearly full of water. She was saved by the exertions of a pilot boat which was bound in. The court held that this was not a case of salvage, but of pilotage only. And in Hope *v.* Brig Dido, 2 Paine, C. C. 243, where a vessel was met with at sea without a rudder, it was held that if she was thereby rendered innavigable it was a salvage service, but not otherwise; and it was said that before pilots can be salvors they must discharge their duties as pilots, and there must be efforts, perils to be encountered, and labor and skill out of the line of their duty.

[7] Le Tigre, 3 Wash. C. C. 567. *Washington*, J., in this case said: "We have no doubt, that if a collector, or other revenue officer, intending to act in the line of his

So may a magistrate, under similar circumstances.[1] And the agent of Lloyd's,[2] or of American insurance companies, or even one who is the especial agent of the owners, for the very purpose of recovering the ship and cargo, may nevertheless perform services which will make him a salvor.[3] A prize ship in distress, if saved and brought into port by strangers, will be held subject to salvage; and after deducting salvage, the proceeds will be restored to those who were in possession of her.[4]

The officers and crew of our national vessels are so far bound to rescue a vessel from mutineers, that they are not entitled to claim salvage for such a service,[5] unless, perhaps, where they incur great personal danger and use great exertions in the performance of the service. But for an ordinary salvage service they are clearly entitled to compensation.[6] But as their time and the

official duty, but mistaking the law and transcending his authority, is the meritorious cause of saving property to the owner, he is not precluded on account of the motive which actuated him, from claiming salvage."

[1] See the case cited by Dr. Lushington, in The Purissima Concepcion, 3 W. Rob. 181, 184. But in The Aquila, 1 Rob. Adm. 37, 46, Sir *W. Scott* held that a magistrate who gave notice of the disaster to the consul of the country to which the vessel belonged, and to Lloyd's, and who administered an oath to fifteen men whom he sent to assist the vessel, was not entitled to claim as a salvor.

[2] The Lord Cranstoun, cited 2 Hagg. Adm. 207; The Purissima Concepcion, 3 W. Rob. 181. But see The Lively, 3 W. Rob. 64. The case of The Purissima Concepcion came before the court again, 7 Notes of Cases, 503, and the learned judge said that the case must not be taken as a precedent; and only a small amount was allowed. In The Traveller, 3 Hagg. Adm. 370, where assistance was rendered to a vessel by a steamer belonging to Lloyd's agent, the court said that this circumstance would not affect the claim.

[3] The Happy Return, 2 Hagg. Adm. 198; The Favorite, 2 W. Rob. 255, 259.

[4] Booth *v.* Sch. L'Esperanza, Bee, Adm. 92.

[5] The Francis and Eliza, 2 Dods. 115. But see United States *v.* The Amistad, 15 Pet. 518.

[6] The Lord Nelson, Edw. Adm. 79; The Pensamento Feliz, Edw. Adm. 115; The Gage, 6 Rob. Adm. 273; The Louisa, 1 Dods. 317; The Mary Ann, 1 Hagg. Adm. 158; The Thetis, 3 Hagg. Adm. 14; The Elwell Grove, id. 209; L'Esperance, 1 Dods. 46; The Wilsons, 1 W. Rob. 172; The Iodine, 3 Notes of Cases, 140; The Charlotte Wylie, 2 W. Rob. 495. In Robson *v.* The Huntress, 2 Wallace, C. C. 59, a salvage service performed by an English man-of-war to an American brig on the coast of Africa, was compensated for. In The Lustre, 3 Hagg. Adm. 154, the use of a government steamer was allowed by the admiral, "upon the express stipulation and condition that the owners and underwriters would be answerable for the payment of the stores expended or damaged." It was held that this agreement did not bar the right of the officers and crew to salvage compensation. In The Rosalie, 1 Spinks, Adm. 188, 25 Eng. L. & Eq. 605, which was probably the last case in England on this subject prior to the statute, referred to *infra*, Dr. *Lushington* expressed himself to be strongly in favor of allowing national vessels to claim as salvors.

property which they subject to risk belong to government, their compensation is less than it would otherwise be;[1] and the government is allowed for the pay, victualling, and wear and tear of the ship, while employed in a salvage service.[2]

In England the right of its vessels of war to sue as salvors, except in certain instances, is taken away by statute, unless the admiralty gives its consent.[3] But in this country, although it is very unusual for our ships of war to claim salvage, we know of no law which would prevent them from so doing.[4] So in respect

[1] The Clifton, 3 Hagg. Adm. 117; The Rapid, id. 419.

[2] The Thetis, 3 Hagg. Adm. 14.

[3] Merchants' Shipping Act of 1854, 17 and 18 Vict. c. 104, § 484, and seq. The court took jurisdiction under this act, with the consent of the Lords of the Admiralty, in the cases of The Earl of Eglinton, 1 Swabey, Adm. 7, and of The Mary Pleasants, 1 Swabey, Adm. 224.

[4] The Act of Dec. 22, 1837, ch. 1, 5 U. S. Stats. at Large, 208, authorizest he President to cause a suitable number of public vessels to cruise upon the coast in the severe portion of the season, to afford aid to vessels in distress. While engaged in such a service we presume that they would not be entitled to claim any extra compensation; but we know of no law that would prevent their acting as salvors at any other time. This question has been several times considered by the attorneys-general of the United States, and opinions have been given to the following effect. In 1824, Mr. *Wirt* gave an opinion that a United States vessel was not entitled as against government to salvage for saving property of the United States, wrecked on Florida Reef. 1 Attorney-Gen. Opin. 675. In 1849, Mr. *Reverdy Johnson* gave an opinion in favor of the right of an American vessel of war to claim salvage for assisting a French ship. 5 Attorney-Gen. Opin. 116. In 1856, the question was presented to Mr. *Caleb Cushing*, whether the officers and crew of a coast survey steamer had any right to receive and retain for their own use, salvage for assistance rendered to a merchant vessel of the United States. This learned jurist doubted whether any compensation could be granted without the consent of the executive. This doubt was founded on the language of Mr. Justice *Story* in the case of United States *v.* The Amistad, 15 Pet. 518, 597, which was: "As to the claim of Lieutenant Gedney for the salvage service, it is understood that the United States do not now desire to interpose any obstacle to the allowance of it, if it is deemed reasonable by the court." The opinion was also given to the Secretary of the Treasury, that he might by standing regulations forbid the demand of salvage by any public ship under the orders of the treasury department. 7 Attorney-Gen. Opin. 756. In 1851, in the case of The Josephine, 2 Blatchf. C. C. 322, Mr. Justice *Nelson* was of the opinion that cases might exist in which seamen on board a man-of-war might claim salvage, notwithstanding general instructions to the contrary from the government; but held that, "In such cases, something more than the usual peril should be encountered by the officers and crew, and an extraordinary service should be rendered, exceeding the duty imposed upon them by their employment in the public service and the special instructions of the government on the subject. Ordinary service in rescuing American vessels in distress, requiring no great hardship or peril on the part of the officers and crew, would seem to fall directly within the line of the general duty thus enjoined. It is a service bestowed by the government for the protection and encourage-

to the coast guard in England. It is appointed to protect the revenue and to prevent smuggling, and, although paid by the public, yet the persons who compose it have a clear right to salvage compensation if they perform salvage services.[1]

It has been said that effective services by steamboats should be particularly encouraged; and one obvious reason for this would be, that it is wise to offer a particular inducement to those whose services might often be particularly useful from their comparative independence of wind and tide.[2] If the service is merely one of ordinary towage, as a general rule, only the usual towage compensation is to be given.[3] But if a vessel is in distress, and in such a condition that a salvage service can be performed, it is no less a salvage service when performed by a steamer because she can do it with more safety to herself than a sailing vessel could.[4]

ment of its commercial marine, and the right to impose this duty on government vessels is too clear to be controverted. Great and extraordinary service and peril in rescuing a vessel and her cargo would present a different question, and stand upon different principles and policy. Such acts should of themselves be the subject of reward and encouragement, and would not be necessarily comprehended in the duty resulting from the public employment of the persons rendering it, or from the instructions of the government." It may also be remarked, that by a United States statute, as we shall see hereafter, salvage is allowed national vessels for recapturing property of the United States.

[1] The Ocean, Eng. Adm. 1838, 2 Monthly Law Magazine, 441.

[2] The Raikes, 1 Hagg. Adm. 246, decided in 1824. This is said to be the first case in which a steam vessel claimed salvage. See also, Brooks *v.* The Wm. Penn, U. S. C. C., South Carolina, 1 Am. Law Register, 584.

[3] The Princess Alice, 3 W. Rob. 138; The Harbinger, 20 Eng. L. & Eq. 641; The Albion, 2 Hagg. Adm. 180, note. Where a steam-tug goes out of port for the express purpose of towing a particular vessel in, under circumstances which make it a mere towage service, it seems that the expense and time of going out are to be compensated for as well as the actual labor of towage. The Graces, 2 W. Rob. 294. In The Red Rover, 3 W. Rob. 150, a fishing vessel was struck by a flaw of wind, and her masts blown overboard. The weather afterwards being fine, she was towed by another fishing smack into a port of safety. The court considered it a salvage service, but of so trivial a nature that only five pounds, without costs, were awarded. The value of the vessel was £100. In Stevens *v.* The Steamboat S. W. Downs, 1 Newb. Adm. 458, where a steamboat towed another from the wharf to a place of safety, and thus prevented her from coming in contact with another steamer on fire, it was held that she was not to be regarded as a salvor; but was entitled to greater compensation than a *quantum meruit*. Stevens *v.* The Steamboat S. W. Downs, 1 Newb. Adm. 458.

[4] The United Kingdom, 3 Hagg. Adm. 401, note; The London Merchant, id. 394; The Meg Merrilies, id. 346; The Traveller, id. 370; The Earl Grey, id. 363; The Isabella, id. 427; The Reward, 1 W. Rob. 174, 177; The Kilby, 26 Eng. L. & Eq.

As a general rule, none can claim salvage, who did not directly aid and participate in the salvage service, or promote those services by doing the work of those rendering them,[1] as in the case with that part of the crew who are left behind.[2] An exception, and a liberal one, is usually made in favor of the owners of the saving vessel, who are not only entitled to claim compensation for stores, etc., supplied, but salvage compensation in addition.[3] But the owner of the cargo has no claim for salvage,[4] unless the stoppage and deviation for the purpose of the salvage were authorized by him.[5] Otherwise, his remedy for any loss caused by the deviation is only against the owner or master.[6]

596, note; The Kingalock, 1 Spinks, Adm. 263, 26 Eng. L. & Eq. 596; The Medora, 1 Spinks, Adm. 17; The Charles Adolphe, 1 Swabey, Adm. 153; The H. B. Foster, Abbott, Adm. 222; Hennessy *v.* Ship Versailles, 1 Curtis, C. C. 353; The Independence, 2 Curtis, C. C. 350.

[1] The Vine, 2 Hagg. Adm. 1. The claim of an officer of the coast guard who permitted his men to render assistance to a vessel, but did nothing himself, was in this case denied. See also, The Charlotte, 3 W. Rob. 68; Waterbury *v.* Myrick, Blatchf. & H. Adm. 34. And underwriters who employ a vessel to go to the assistance of property which they have insured, are not entitled to claim as salvors. The Pickwick, 20 Eng. L. & Eq. 628. The claim of the admiral of a station is refused in case of recapture, unless he has the right by statute. The Calypso, 2 Hagg. Adm. 209. See also, The Thetis, 3 Hagg. Adm. 14, 48, 58, 63.

[2] See ante, p. 602, n. 4.

[3] The San Bernado, 1 Rob. Adm. 178; The Jane, 2 Hagg. Adm. 338; The Salacia, id. 262, 264; The Martha, 3 id. 434; The Roe, 1 Swabey, Adm. 84; The Janet Mitchell, id. 111; The Perla, id. 230; Evans *v.* The Ship Charles, 1 Newb. Adm. 329; The Baltimore, 2 Dods. 132; The Nathaniel Hooper, 3 Sumner, 542. In Waterbury *v.* Myrick, Blatchf. & H. Adm. 34, the master left the vessel at her outward port, neglected the sale of the cargo belonging to the ship-owner and other shippers, pledged part of the cargo, and with the proceeds hired another vessel and performed a salvage service. The court held that the owners of the vessel were not entitled to participate in the results of this adventure, because their vessel had not been used, and that their remedy against the master for the breach of his duty in selling the cargo was in a court of common law. See also, post, p. 622.

[4] The Ship Nathaniel Hooper, 3 Sumner, 542; Bond *v.* Brig Cora, 2 Pet. Adm. 361; Taylor *v.* Ship Cato, 1 Pet. Adm. 48, 67.

[5] Mason *v.* Ship Blaireau, 2 Cranch, 240.

[6] The reason given for making a distinction between the owner of the ship and the owner of the cargo, is, that the latter has his remedy in case of a deviation against the owner of the vessel, or against the ship *in rem*, so that although his insurance is forfeited, he incurs no loss, because by the deviation the owner of the ship becomes an insurer. But if the doctrine of Dr. *Lushington* be correct, that every owner is to be treated as uninsured, there would seem to be no difference between them in this respect. See The Deveron, 1 W. Rob. 180. And as the liability of the owner is now so much

The lord of a manor cannot claim salvage for taking against the consent of the owner, and preserving parts of a ship thrown up by the sea upon his land, when the servants of the owner are there to take care of it for him.[1] It does not detract from the merit of a service rendered by salvors, that they acted under the direction of an officer in the navy, who held an official appointment at the place where the service was performed.[2]

It has been said that the charterers of a vessel are not, except under very special circumstances, entitled to the salvage earned by the vessel;[3] but we should consider the rule to be, that if, by the terms of the charter-party, the vessel itself is let to the charterers, they should be considered the owners, and as such entitled to salvage, but not, if the use of the vessel is all they pay for.[4]

SECTION III.

OF DIFFERENT SETS OF SALVORS.

Salvors falling into distress and saved by other salvors, do not lose their claim; but their salvors share it with them according to their merit.[5] But a second set of salvors have no right to interfere with the first set, unless there is reasonable ground for the belief, that the first salvors alone cannot save the property.[6]

limited by statute, it may be a serious question whether the risk of the shipper of goods is not sufficiently great to entitle him to some proportion of the salvage.

[1] Sutton *v.* Buck, 2 Taunt. 301.

[2] The Persia, 1 Spinks, Adm. 166.

[3] The Alfen, 1 Swabey, Adm. 189. The terms of the charter-party do not very clearly appear in the report of this case.

[4] For the difference between these two modes of hiring, see ante, Vol. I. p. 232.

[5] The Ship Henry Ewbank, 1 Sumner, 400; The Jonge Bastiaan, 5 Rob. Adm. 322. In The Watt, 2 W. Rob. 70, a deduction was made from the amount decreed, to compensate for the services of a steamer which completed the salvage service.

[6] Hand *v.* The Elvira, Gilpin, 60; The Maria, Edw. Adm. 175; The Blenden Hall, 1 Dods. 414; The Eugene, 3 Hagg. Adm. 156; The Samuel, 4 Eng. L. & Eq. 581. In The Amethyst, Daveis, 20, a wreck was discovered by three schooners, just before sunset, and was boarded by one of them. No one, however, remained on board that night, but the three vessels lay by the wreck in order to tow her into port the next morning. At daylight she was about a mile from them, and they proceeded at once to

If the second set of salvors can show that their services are actually necessary and useful, or that valuable property has been saved by them, which otherwise would probably have been lost, then, we should have no doubt, that the second set had established a salvage claim, even if the first set had opposed and actually resisted their interference.[1]

There is also a distinction of much importance to be noticed in this connection. When a vessel is derelict, the party first taking possession, has a vested interest in the property, and no one can interfere with him, except in a case of manifest incompetency on his part; but in an ordinary case of disaster, when the master remains in command, it is his province to determine the amount of assistance which is necessary, and the first salvors have no right to prevent other persons from rendering assistance, if the master wishes such aid.[2]

take possession, but before they reached the wreck, she had been boarded by persons from another vessel. These they displaced, and towed the vessel off. Held, that the possession they had taken the night before was of a sufficiently continuing nature, and that the stranger vessel was not entitled to any salvage.

[1] The Rose in June, cited 2 Hagg. Adm. 364; The Charlotta, 2 Hagg. Adm. 361; The Effort, 3 Hagg. Adm. 165; The Queen Mab, 3 Hagg. 242; The Pickwick, 20 Eng. L. & Eq. 628. In The Dosseitei, 10 Jurist, 865, the vessel was taken by the salvors and anchored in a place of some danger, and left there for several hours, while the salvors went for more ropes and spars, which were necessary. There was a vessel near by, which offered to furnish them, and if they had been accepted, the vessel saved might have been taken at once to a place of perfect safety. They were refused, and after some delay, the original salvors took the vessel to a port of safety. It did not appear, that the delay produced any loss to the vessel, but the court were of the opinion, that there was great risk in leaving the vessel at anchor in an exposed situation, and diminished the amount of salvage on that account. The learned judge also stated, that if he thought the refusal to take the ropes, etc., from the other vessel, was for the purpose of preventing it from rendering any assistance, and thus obtaining a larger salvage, he would have refused compensation altogether. See also, The Glory, Eng. Adm. 1850, 2 Eng. L. & Eq. 551. In this case, a vessel got upon the sands, and the services of a steam-tug were refused by some salvors who had tendered their aid to the vessel. Dr. *Lushington*, on this account, gave the salvors but one third of what they would otherwise have been entitled to. After stating the general rule, that salvors cannot interfere with each other, the learned judge said: "I cannot conceive that any notion can be broached, more injurious to the security of the mercantile navy of this country, than a notion, that because a man happened first to go aboard a vessel, and then a steam-tug was offered, he had a right to refuse that assistance, and claim to perform the duty himself, because by possibility, a set of salvors might heave a vessel by an anchor, or succeed in getting her off the sand."

[2] The Dantzic Packet, 3 Hagg. Adm. 383; The Black Boy, 3 Hagg. Adm. 386, note; The Glascow Packet, 2 W. Rob. 307; The Glory, Eng. Adm., 1850, 2 Eng. L. & Eq. 551; The Samuel, 4 Eng. L. & Eq. 581.

If the first set entirely abandon the property, and cease their efforts to save it, and a second and independent set of salvors then take hold, the first set have no right to return and claim priority, and, indeed, have no right to interfere with the second set, without necessity.[1] But if the first set, before they left the ship or goods, had materially benefited the same, and made it easier or more practicable to save it, their claims would then, undoubtedly, be allowed to a proper extent.[2] If, however, the first set have, by their carelessness, injured the property, they are not entitled to salvage; but if the second set have rendered efficient service, and are in no way connected with the damage done by the first, they are entitled to salvage, although they sue in the same cause.[3]

The second salvors cannot lawfully, under any circumstances, make it a condition of their rendering assistance, that the first salvors shall abandon their claims to salvage, and any such bargain will be disregarded.[4]

If any persons intrude themselves upon salvors, unnecessarily, and without any sufficient reason, all the services they perform, are held to enure to the benefit of the original salvors.[5]

SECTION IV.

WHAT AMOUNTS TO A SALVAGE SERVICE.

If the peril encountered be something distinctly beyond ordinary danger, something which exposes the property to destruction unless extraordinary assistance be rendered, it is enough to found a claim for salvage. But if the master can, by a proper use of the means he possesses, save the property, the law

[1] The India, 1 W. Rob. 406.

[2] See The Jonge Bastiaan, 5 Rob. Adm. 322; Cowell *v.* The Brothers, Bee, Adm. 136; The Samuel, 4 Eng. L. & Eq. 581.

[3] The Neptune, 1 W. Rob. 297.

[4] The Ship Henry Ewbank, 1 Sumner, 400, per *Story*, J.

[5] The Blenden Hall, 1 Dods. 414; The Fleece, 3 W. Rob. 278; The Mary, 2 Wheat. 123; The Brig John Gilpin, Olcott, Adm. 77.

presumes that he will, and that the salvors' interference was unnecessary.[1] But even if the master could save the ship, the salvors may show that he would not have done so. So, if the salvors could have prevented the wreck by timely assistance, but purposely delayed this, they cannot be rewarded as salvors. If the assistance of the salvors is requested by, and rendered to the persons in charge of another vessel, they cannot plead that they are not bound to pay for the services rendered, on the ground that the vessel would have been saved if left in her former position;[2] and it is not necessary "that the distress should be actual or immediate, or that the danger should be imminent and absolute; it will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered."[3]

That the property must be actually saved, and saved by those claiming to be salvors, in order to lay the foundation for salvage claims in admiralty, is quite certain.[4] But this general rule should, we think, be qualified by saying that if the party encounters the danger, and does all he can to save the vessel, and his services tend in some degree to preserve the vessel, compensation will be awarded to him, although the vessel is mainly preserved by other means.[5]

[1] Hand *v.* The Elvira, Gilpin, 60, 67.

[2] Stevens *v.* The S. W. Downs, 1 Newb. Adm. 458.

[3] The Charlotte, 3 W. Rob. 68, 71.

[4] Clarke *v.* Brig Dodge Healy, 4 Wash. C. C. 651; The Henry Ewbank, 1 Sumner, 400, 416; Montgomery *v.* The T. P. Leathers, 1 Newb. Adm. 421, 428; Emerson *v.* Proceeds of The Bark Pandora, 1 Newb. Adm. 438.

[5] Thus in McGinnis *v.* The Steamboat Pontiac, 1 Newb. Adm. 130, 5 McLean, 359, a person was requested to take charge of a boat which was in the ice in a position of great danger. He did so, and did all that could be done under the circumstances, and it was held, although the boat was saved by the peculiar manner in which the ice broke up, that he was entitled to salvage. In The Ranger, 9 Jurist, 119, a vessel negligently got upon the sands. Another vessel saw her, and at much risk crossed a shoal part of the sands and hastened to her assistance, but before she arrived, the first vessel got off. The court held that as no actual salvage service was rendered, the vessel could not claim salvage, but as she was induced to go to the assistance of the one on shore to assist her when she was in danger, and as the danger was occasioned by negligence, the vessel was entitled to the expenses she had incurred. In the case of The Albion, 3 Hagg. Adm. 254, where a vessel attempted to assist another in towing a wreck, but could not render any assistance, Sir *John Nicholl* said: "She is entitled to some remuneration: she has the merit of going to assist — she showed a willingness,

If the vessel be fraudulently imperilled by the master, this does not defeat the claim of the salvors, unless they were parties to the fraud, or were cognizant of it while it was going on, and did not interfere to prevent it as far as they could, or endeavored to conceal the master's misconduct and screen him from detection.[1]

As it is equally a salvage service, and within admiralty jurisdiction, whether the service be rendered at sea, or when the vessel is wrecked on the coast,[2] and whether it be performed by seamen or by landsmen;[3] so, in the case, when the salvors neglected their growing crops of cotton, in order to save the property, this fact was considered in awarding salvage.[4] But one whose vessel had been lost while conveying the things saved to another place of delivery, is entitled only to freight, not to salvage.[5]

On the other hand, when a barge was brought in which was found without anchor or crew, salvage was denied, because it was shown to be usual to leave barges there in that condition,[6] and generally mere land service in unlading a shipwrecked vessel and superintending those unlading her, is not a salvage service.[7] If a vessel at sea is short-handed by reason of sickness, and is navigated into port by part of the crew of another vessel, this is to be treated as a salvage service.[8] But when salvors found a ship derelict and went on board, and in their haste forgot to take with them a log glass, a watch, and a chart, it was held that the officer of a king's vessel, who was afterwards requested to supply these articles, and payment offered, was not

and her offer of assistance was accepted; but it is clear that she impeded the progress of the service." And £100 was allowed, the value being £4,600. See also, The E. U., 1 Spinks, Adm. 63; The Santipore, id. 231.

[1] Brevoor *v.* The Fair American, 1 Pet. Adm. 87, 95.

[2] Stephens *v.* Bales of Cotton, Bee, 170; The Jonge Bastiaan, 5 Rob. Adm. 322.

[3] Stephens *v.* Bales of Cotton, Bee, 170.

[4] Stephens *v.* Bales of Cotton, Bee, 170.

[5] Stephens *v.* Bales of Cotton, Bee, 170.

[6] The Upnor, 2 Hagg. Adm. 3.

[7] The Watt, 2 W. Rob. 70. See cases cited ante, p. 606, notes 1 and 2.

[8] Williamson *v.* Brig Alphonso, 1 Curtis, C. C. 376; The Active, 1 Eng. L. & Eq. 644; The Roe, 1 Swabey, Adm. 84; Sturtevant *v.* The Geo. Nicholaus, 1 Newb. Adm. 449. In The Janet Mitchell, 1 Swabey, Adm. 111, a vessel was met with in distress, her captain having been drowned, and some one was required to manage her. The mate of the vessel volunteered his services, and the vessels reached their ports in safety. Salvage was allowed to the owners, master, and rest of the crew.

entitled to dispossess the first salvors, on the ground that they could not bring the vessel safely to port without his assistance.[1]

But it is said that a salvage service can only be founded in the rescuing of a ship and cargo from some impending danger or distress.[2] It would, therefore, seem that if part of the crew were captured, and subsequently recaptured and restored to their vessel, the only claim of the recaptors would be on the ground of supplying the deficiency in the number of the crew occasioned by the capture.[3]

Compensation has been granted for keeping near a vessel in distress, at the earnest request of her master and crew, although but little aid was rendered.[4] If a vessel is stranded near her port of destination, and it becomes necessary to transship the cargo, this is a salvage service.[5] So, if a vessel in distress is boarded at some risk by a fishing smack, and an order for a steamer taken, compensation as salvage is allowed.[6] And generally the court may give compensation, in the nature of salvage, for services which fall below those necessary to found a strict salvage claim.[7]

In a case where some shipwrecked mariners were taken from a ship which had rescued them, and they brought with them a bag of gold, which was taken on board the vessel, it was held that, although this last vessel was not entitled to claim salvage, the persons and property being in no danger at the time, yet that a compensation was due beyond mere freight money.[8] And salvage has been awarded for rescuing a raft of timber which was floating out to sea.[9]

[1] The Blenden Hall, 1 Dods. Adm. 414, 419.

[2] The Mary, 1 W. Rob. 448, 457.

[3] The Mary, 1 W. Rob. 448. The master and part of the crew in this case had been taken by pirates, and the vessel at the time she was discovered by the alleged salvors was in the offing with a signal of distress flying. They went out to her and brought her safely in, and afterwards joined in an expedition against the pirates. The master and crew were ransomed, and then the pirates attacked. The court held that salvage was only due for conducting the vessel into harbor.

[4] Allen *v.* Ship Canada, Bee, 90.

[5] The Westminster, 1 W. Rob. 229.

[6] The Ocean, 2 W. Rob. 91. The value of the ship, cargo, and freight was £10,500, and £40 were allowed.

[7] George *v.* Ship Arctic, Bee, 232.

[8] Williams *v.* Box of Bullion, U. S. D. C., Mass., 6 Law Reporter, 363.

[9] A Raft of Spars, Abbott, Adm. 485.

As a general rule, when two vessels come into collision, they are bound to render assistance to each other if necessary; and one aiding the other cannot generally claim salvage, although the one assisted was the cause of the accident.[1]

SECTION V.

OF DERELICT.

As to what is "derelict" there is no certain and accepted definition; and perhaps none better than a vessel which is abandoned and deserted by her crew without any purpose on their part of returning to the ship, or any hope of saving or recovering it by their own exertions.[2] If so abandoned, the ship is derelict, although the vessel is afterwards saved by the crew who left her, they having unexpectedly received assistance.[3]

If the ship be only temporarily left, with the distinct purpose of return, it is not abandoned, and therefore not derelict.[4] And

[1] The Sappho, 1 Swabey, Adm. 242. A small amount of salvage was, however, allowed in this case, though the general rule was said to be that which we have stated in the text.

[2] The Aquila, 1 Rob. Adm. 37; The Amethyst, Daveis, 20; Rowe *v.* Brig ——, 1 Mason, 372; The Elizabeth and Jane, Ware, 35; The Caroline, 2 W. Rob. 124; The Charlotta, 2 Hagg. Adm. 361; The Effort, 3 Hagg. Adm. 165; The Winsor Castle, 2 Notes of Cases, Supp. liii.; Mason *v.* Ship Blaireau, 2 Cranch, 240; The Watt, 2 W. Rob. 70; The Clarisse, 1 Swabey, Adm. 129. In The Minerva, 1 Spinks, Adm. 271, a vessel was stranded on the coast, and the crew in endeavoring to escape, were all drowned. The vessel was afterwards saved, and the court held that it was a case of derelict.

[3] The Boston, 1 Sumner, 328. The vessel in this case was run into at sea. The master and crew, supposing she was about to founder, took to their boats, and afterwards met another vessel, by whose aid the next day their own vessel was brought into port. Held to be a case of derelict. See also, The Florence, 20 Eng. L. & Eq. 607.

[4] There can be no doubt of the general principle that the master and crew may leave a vessel, and she cannot be considered as a derelict, if they had the intention of returning. Thus, if a vessel is left at anchor in the stream without any one on board, the master and crew having left with the intention of returning, this of course would not be a derelict. See The Upnor, 2 Hagg. Adm. 3. See also, The Bee, Ware, 332; Tyson *v.* Prior, 1 Gallis. 133. In Clarke *v.* Brig Dodge Healy, 4 Wash. C. C. 651, it was held that where a vessel imbedded in the ice was drifting towards a shoal, upon which, if she had struck, she would have probably gone to pieces, and the crew left her on

if the master and crew remain on board, but give up the entire control of the vessel to the salvors, this does not make a derelict.[1] But if property be actually deserted at sea, the presumption that it is derelict exists, and casts upon those who left it the burden of proving their purpose of return.[2] If the ship or property be left without any intention whatever, either of return or otherwise, as by those who jump suddenly from a ship they think sinking, on board another, if the crew are carried off in the vessel against their will, the vessel left is derelict *de facto*, but not *de jure*.[3] But it has been held that where the master and crew leave the vessel for the preservation of their lives, a mere intention of sending a steamer to look for the vessel, does not prevent it from being a derelict.[4]

So a ship or goods sunk under the waters are generally derelict, but would not be so if the owner had not lost the hope and purpose of recovering his property, nor ceased his efforts for that

account of this danger, with the intention of returning if the danger should be escaped, the vessel was not a derelict. See also, The John Perkins, U. S. C. C., Mass., 21 Law Reporter, 87, 94; The Schooner Emulous, 1 Sumner, 207. But if a vessel is deserted *de facto*, and while exposed to great danger is rescued by salvors, she will, it would seem, be considered a derelict, if the master and crew at the time when they left her had no intention of returning, or rational hope of regaining possession of the vessel, though they endeavored to take possession after the salvors had rendered assistance. The Sarah Bell, 4 Notes of Cases, 144. See also, The Brig John Gilpin, Olcott, Adm. 77.

[1] Montgomery *v.* The T. P. Leathers, 1 Newb. Adm. 421.

[2] The Cosmopolitan, 6 Notes of Cases, Supp. xvii., in the Irish Admiralty.

[3] The Fenix, 1 Swabey, Adm. 13; The Cosmopolitan, 6 Notes of Cases, Supp. xvii. in the Irish Admiralty. In this latter case as soon as it was found that their vessel had not sunk, the master and crew desired to return, but were prevented by the master of the vessel on which they were. The court considered that the leaving the vessel was under a momentary impulse for the purpose of saving their lives, and that it could not be considered as an abandonment, because they wished to go back as soon as their judgment returned. Stress was also laid on the fact that the leaving the vessel at the moment the crew did, tended rather to increase than diminish their power to save the vessel. But for these facts the case is similar to that of Mason *v.* Ship Blaireau, 2 Cranch, 240, where the vessel, deserted by her crew, who jumped on board the vessel which ran into them, was considered a derelict. In The Pickwick, 20 Eng. L. & Eq. 628, the vessel came into collision with another, and the master and crew, with the exception of three men at once abandoned her through fear. The three men afterwards left, and three days after the collision she was found deserted. Dr. *Lushington* said: "It has never been held that an abandonment at the instant of collision constitutes derelict, but I can entertain no doubt that in the legal sense of the word, this vessel was a derelict to all intents and purposes, because three days had elapsed from the time of the collision."

[4] The Coromandel, 1 Swabey, Adm. 205.

purpose.[1] If goods are saved from a wreck, and the crew are taken off at the same time, the goods cannot be considered as derelict.[2] Nor are they so considered, where the vessel goes to pieces on the shore and the cargo floats out, if the master is using exertions to save them, unless indeed where the goods float out to sea.[3]

If a ship or property be left, though not derelict, one who in good faith takes possession as salvor, is not a trespasser, but has his reasonable claim for salvage, according to the good he actually does.[4]

By the common law, the finder of lost property has an absolute title to it against all the world, except the owner. In England, however, derelicts found at sea belonged to the Lord High Admiral until they were given up by him, in the reign of Queen Anne, to the sovereign, who for the most part since that time has continued to take them in a capacity distinguishable from that of sovereign. Wrecks, by which is meant property cast on the shore, often in England belong to the lord of the manor, who is authorized to keep them a year and a day for the owner, and if none appears at the expiration of that time, the property vests absolutely in the lord.[5]

What disposition is to be made of property found abandoned, when no one appears to claim it, cannot be said to be settled in this country. In an early case in Massachusetts, it was held that after the salvage was paid the property belonged to the government, to hold in trust till an owner should appear.[6] In

[1] The Barefoot, 1 Eng. L. & Eq. 661; Bearse *v.* Pigs of Copper, 1 Story, 314. See also, The Thetis, 3 Hagg. Adm. 14.

[2] Warder *v.* La Belle Creole, 1 Pet. Adm. 31.

[3] The Samuel, 4 Eng. L. & Eq. 581.

[4] It would seem, however, to be well settled on principle and authority, that if a vessel is not a derelict, the master and his owners have the power, unless there is some immediate danger, to decline any assistance, and to choose their own salvors, and if persons render them assistance against their will, these persons will not only recover nothing for their services after the prohibition, but may forfeit compensation for their prior services. The Glascow Packet, 2 W. Rob. 306; The Barefoot, 1 Eng. L. & Eq. 661; The Glory, 2 Eng. L. & Eq. 551. The case of The John Gilpin, Olcott, Adm. 77, where an opposite doctrine is intimated, proceeded on the ground that the vessel was derelict.

[5] The King *v.* Property Derelict, 1 Hagg. Adm. 383; The King *v.* Two Casks of Tallow, 3 id. 294; The King *v.* Forty-Nine Casks of Brandy, 3 id. 257. See also, The Merchants' Shipping Act of 1854, 17 and 18 Vict. c. 104, § 471–475, for the present state of the law on this subject in England.

[6] Peabody *v.* The Proceeds of 28 Bags of Cotton, U. S. D. C., Mass., 1829, 2 Am.

another district of this country, the practice, however, is to keep the proceeds a year and a day after the salvage is paid, and if no owner then appears, to pay them to the finder.[1] This we think is the more correct doctrine, and we should suppose that the court might in its discretion require bonds from the finder to restore the value of the property, if the owner should appear and claim it.

SECTION VI.

OF COMPENSATION IN CASES OF SALVAGE.

In respect to salvage compensation, the long-settled practice of the admiralty court has been to view it not as mere pay on the principle of a *quantum meruit*, or as a remuneration *pro opere et labore*, but as a reward given for bravely encountering the perils of the seas, that the general interests of navigation and the commerce of the country may be advanced.[2] But the court does not act on the same liberal principle as in prize cases.[3] And it has been said that in salvage claims arising on our western rivers, the precedents of courts administering the admiralty law on the ocean, in regard to the amount of compensation, cannot be safely adopted, because the peril of life is generally much less.[4]

As to the amount of salvage which shall be decreed, or the proportions in which it shall be given to salvors, there is no fixed rule nor binding precedents, nor practice in admiralty.[5] Indeed,

Jurist, 119. The property in this case was found at sea and libelled for salvage, and one half was decreed. Twenty-two years afterwards, no owner having appeared, a supplemental libel was filed by the finders to recover the balance; but the court decreed as stated in the text.

[1] See Marvin on Salvage, 143, note 1.

[2] The Sarah, 1 Rob. Adm. 313, note; The William Beckford, 3 Rob. Adm. 355; The Hector, 3 Hagg. Adm. 90, 95; The Clifton, id. 117, 120; The Industry, id. 203, 204; Mason *v.* The Blaireau, 2 Cranch, 240, 266; and cases *passim*.

[3] The Vine, 2 Hagg. Adm. 1.

[4] McGinnis *v.* The Steamboat Pontiac, 1 Newb. Adm. 130, 5 McLean, C. C. 359.

[5] In The Thetis, 3 Hagg. Adm. 14, 62, Sir *Christopher Robinson* said: "The practice of the last century may be described in the following few pages, taken from a book of MS. notes, of the late Sir Edward Simpson, to which my predecessor often referred. 'The maritime laws of England fix no certain proportion in cases of salvage, but are governed by circumstances of danger, hazard, trouble, and expense of saving; an

it can scarcely be said that there is any rule whatever, except that ancient one, which gives to the salvors one half of the property saved, when that property was absolutely "derelict" or abandoned; although Lord Stowell has declared this to be "obsolete," as a fixed rule.[1] And the position seems now to be established, that the reward in derelict cases should be governed by the same principles as in other salvage cases, namely, danger to property, value, risk of life, skill, labor, and the duration of the service.[2] And it may be taken as the prevailing disposition of admiralty courts, or as has been said, as the general sense of the maritime law, that salvage on derelict, should not in ordinary cases, go below a third, and never, or almost never, above one half.[3] And we are of opinion, that English and American courts would now hesitate to give so much as half, unless in cases of unquestionable derelict, nor even then, unless there were in the case peculiar circumstances, of exertion, peril, or merit.[4] The rule of a moiety was formerly applied much more severely against the owners of the saved property, though it was seldom exceeded,[5] except where the property was of small amount, and the labor great.[6]

In some English cases, there has been a disposition to discriminate between articles easily saved, as gold and silver coins

eighth or tenth, except in cases of extreme hazard, is as much as is usually allowed. In some cases of extreme hazard, one third of the value, or one fourth, or one sixth, or one ninth, or a sum of money only on account of salvage is given.'" See also, The Adventure, 8 Cranch, 221, and cases *passim*. In Bond *v.* Brig Cora, 2 Wash. C. C. 80, the court said: "In appreciating and properly rewarding such services, no rule but that which a sound discretion may suggest, upon a view of all the circumstances of each particular case can be laid down."

[1] The Aquila, 1 Rob. Adm. 37, 45.

[2] The Florence, 20 Eng. L. & Eq. 607. This doctrine was assented to in Post *v.* Jones, 19 How. 150, 161, but a moiety was nevertheless allowed. In Rowe *v.* Brig ———, 1 Mason, 372, 377, Mr. Justice *Story* considered the old rule of giving a moiety in case of a derelict, as a subsisting but flexible rule; but the doctrine of the text was early asserted in this country. Flinn *v.* The Leander, Bee, Adm. 260.

[3] Tyson *v.* Prior, 1 Gallis. 133, 136; Rowe *v.* Brig ———, 1 Mason, 372, 377; Post *v.* Jones, 19 How. 150, 161; The Frances Mary, 2 Hagg. Adm. 89; The Reliance, 2 Hagg. Adm. 90, note; The Effort, 3 Hagg. Adm. 165, 167; The Elwell Grove, 3 Hagg. Adm. 209, 221.

[4] See The Minerva, 1 Spinks, Adm. 271.

[5] Sprague *v.* Barrels of Flour, 2 Story, 195; The Britannia, 3 Hagg. Adm. 153.

[6] The William Hamilton, 3 Hagg. Adm. 168, and note; The Jonge Bastiaan, 5 Rob. Adm. 322; The Jubilee, 3 Hagg. Adm. 43, note; The Waterloo, Blatchf. & H. Adm. 114.

or bullion,[1] and more bulky and less movable articles; giving a less proportion of the former than of the latter. But we know nothing like this in American decisions;[2] nor is this principle well sustained in England.[3]

From one half, the salvage claim may be diminished by the circumstances to mere wages or a very slight compensation.[4] It is obvious, therefore, that the amount is always dependent upon the particular facts and merits of each case, and the view which the court may take of them. Hardship, long and severe labor, risk of life,[5] exposure to injury of any kind, danger readily encountered, enterprise and energy, and the large value at risk,[6]

[1] The Emma, 2 W. Rob. 315. The remark of Dr. *Lushington* in this case, does not seem to be more than a *dictum*. It was contended, that the court were bound to look to the services rendered to the ship and cargo, separately and apart, and stress was laid on the fact, that the cargo was not, from its nature, liable to damage by immersion in the water. Dr. *Lushington* said: "The ordinary usage of the court is to take the whole value of the ship and cargo, and assess the amount of the remuneration upon the whole, each paying its due proportion; I am not aware, excepting in the instance of silver or bullion, that any distinction has ever been taken, or that parties have been permitted to aver, that the services were of greater importance to the ship, than they were to the cargo, and therefore, that the ship should bear the lesser burden or *vice versa*. With respect to silver and bullion, it is true that a distinction is wisely and properly permitted, and this, upon the consideration that it is more easily rescued and preserved, than more bulky articles of merchandise."

[2] See Warder *v.* La Belle Creole, 1 Pet. Adm. 31, 46. We are not aware that this precise point has been recently determined in this country, but no discrimination is made in favor of bullion in general average. See ante, Vol. I. p. 323, note 3.

[3] See The Jonge Bastiaan, 5 Rob. Adm. 322; The Vesta, 2 Hagg. Adm. 189, 193, per Sir *Christopher Robinson*.

[4] The Purissima Concepcion, 3 W. Rob. 181, 7 Notes of Cases, 503. In The Duke of Clarence, 1 W. Rob. 346, where 25*l.* were tendered on the ground that the service was one of mere ordinary labor, *Dr. Lushington* said: "I apprehend the term, as applied to questions of salvage, to mean that labor which may be performed by an individual not possessed of nautical skill, but of mere strength of arm and limb. When a vessel approaches the shore, mere ordinary labor is always to be obtained in great abundance, but labor united with nautical skill being scarce, is more difficult to be procured. When obtained, its value must be estimated by a somewhat higher consideration than mere ordinary labor." Thirty-five pounds were awarded.

[5] The Ebenezer, 8 Jurist, 385; The William Hannington, 9 Jurist, 631; The William Beckford, 3 Rob. Adm. 355.

[6] When the property is large, a greater sum is given than when it is small. The Ship Henry Ewbank, 1 Sumner, 400, 412; The Earl of Eglinton, 1 Swabey, Adm. 7. But where the property is small, a greater proportion of the value is given than when the property is great. The Blenden Hall, 1 Dods. 414, 421; The Waterloo, 2 Dods. 433, 442; The Vesta, 2 Hagg. Adm. 189; Tyson *v.* Prior, 1 Gallis. 133. In The Ocean, 3 Hagg. Adm. 194, where an anchor, and a chain cable, together with a buoy

and the number of those among whom the salvage must be divided. These are the elements which swell the salvage, and the want of these of course diminishes it. Where a raft of timber was found adrift in New York harbor and taken on shore and watched for several days, the court decreed fifty dollars as salvage.[1]

Perhaps the courts are disposed to encourage nothing more than salvage efforts for the purpose of saving life. The court has no power to decree salvage for saving life merely.[2] "But if it can be connected with the preservation of property, whether by accident or not, then the court can take notice of it, and it is always willing to join that to the animus displayed in the first instance."[3] It has been held that if the lives of the crew are saved by one vessel, and the property by another, the one saving the crew is entitled to salvage.[4] But there seems to be no reason why salvage should be allowed in such a case and not where the crew are saved, but no assistance rendered to the vessel by any one, and the distinction is repudiated by Dr. Lushington.[5]

Slaves being regarded as property, form an exception to this rule, and the owner of them contributes according to their value.[6]

and buoy rope of the value of £20 were found by some mariners who had gone in search of anchors, etc., the court decreed two fifths, after deducting expenses. This suit was brought to determine the amount due in similar cases, and may be considered as a leading case.

[1] A Raft of Spars, Abbott, Adm. 485.

[2] The Zephyrus, 1 W. Rob. 329.

[3] The Aid, 1 Hagg. Adm. 83; The Emblem, Daveis, 61; Sturtevant *v.* The Geo. Nicholaus, 1 Newb. Adm. 449.

[4] The Queen Mab, 3 Hagg. Adm. 242.

[5] The Zephyrus, 1 W. Rob. 329. The Queen Mab is explained on the ground that the vessel was a derelict, and the court had not to contend against any opposition on the part of the owners of the Queen Mab. This subject is now provided for by the Merchants' Shipping Act of 17 & 18 Vict. c. 104, § 459, which enacts that salvage for saving life shall be paid before all other claims; and if, after deducting the expenses incurred, the value of the property shall not be sufficient to pay the amount of salvage due in respect of such life or lives, the Board of Trade may, in its discretion, award such sums as it may deem fit, in whole or in part satisfaction of any amount of salvage so left unpaid. See The Bartley, 1 Swabey, Adm. 198; The Coromandel, id. 205. In The Clarisse, 1 Swabey, Adm. 129, the court allowed salvage for preserving life, although the statute had been passed between the time of the rendering of the service and of the decision.

[6] Jerby *v.* 194 Slaves, Bee, Adm. 226; Flinn *v.* The Leander, id. 260. See also, ante, Vol. I. p. 324, n. 6.

Nevertheless, these efforts to save life do not command a compensation so much higher than is given for the saving of property as might be expected, for the reason that it is not a deviation if the vessel goes out of her way to save life, and therefore the insurance is not forfeited;[1] whereas it is a deviation to wander for the purpose of saving property,[2] and compensation must be made for the forfeiture of the insurance.[3] This deviation, the master, by the law-merchant has a right to make, if in the exercise of a sound discretion he deems it expedient.[4] And if the only means of saving life are by saving property also, as where a vessel was taken in tow, because the crew could not be rescued in any other way, this would not constitute a deviation.[5]

Under ordinary circumstances, the owners of the saving ship have one third of the amount decreed,[6] and may have more if the salvage service exposes their ship to peculiar danger.[7]

[1] See ante, Vol. I. p. 301, n. 6.

[2] See ante, Vol. I. p. 3, n. 1.

[3] See Bond *v.* Brig Cora, 2 Wash. C. C. 80; Warder *v.* La Belle Creole, 1 Pet. Adm. 31; The Nathaniel Hooper, 3 Sumner, 542, 578. But in The Deveron, 1 W. Rob. 180, *Dr. Lushington* held that in apportioning the remuneration in salvage cases every vessel was to be considered as uninsured, on account of the inconvenience in considering whether a vessel had in each case forfeited its insurance. See also, The Orbona, 1 Spinks, Adm. 161.

[4] The Ship Nathaniel Hooper, 3 Sumner, 542, 579.

[5] Crocker *v.* Jackson, U. S. D. C., Mass., 1847.

[6] The Henry Ewbank, 1 Sumner, 400; The Sch. Boston, id. 328; Mason *v.* Ship Blaireau, 2 Cranch, 240; Bond *v.* The Cora, 2 Pet. Adm. 361; The Amethyst, Daveis, 20, 28; Concklin *v.* Brigantine Harmony, 1 Pet. Adm. 34, 43, note; Evans *v.* The Ship Charles, 1 Newb. Adm. 329; Union Tow Boat Co. *v.* The Bark Delphos, 1 Newb. Adm. 412.

[7] In The Waterloo, Blatchf. & H. Adm. 114, the vessel claiming salvage was bound from Havana to Cadiz. In latitude 34° N. 75 W. she found the Waterloo a derelict, and with great difficulty and danger towed her into New York. Two thirds of the amount decreed was allowed the owners, on the ground that the risk was very great, and that the master and crew should not have imperilled property worth $72,000, to rescue property worth $40,000. In the following cases one half of the amount decreed has been allowed the owners. The Columbia, 3 Hagg. Adm. 428; The Martha, 3 Hagg. Adm. 434; The Waterloo, 2 Dods. 433; The Rising Sun, Ware, 378, 385; Taylor *v.* Ship Cato, 1 Pet. Adm. 48, 68; The Cumberland, U. S. D. C., Mass., 1815, cited 1 Sumner, 427; Montgomery *v.* The Steamboat T. P. Leathers, 1 Newb. Adm. 421. In The Nicolina, 2 W. Rob. 175, one fifth was allowed. In The Hope, 3 Hagg. Adm. 423, about two fifths; and in Smith *v.* The Stewart, Crabbe, 218, one thirteenth. In The Albion, 3 Hagg. Adm. 254, where a fishing smack performed a salvage service, seven twentieths were given. In The Deveron, 1 W. Rob. 180, and in The Louisa, 2 id. 22, also cases of fishing smacks, seven sixteenths. The owners of steamers which

Compensation has been refused the owners, where the master had made a valid contract to perform the service.[1] And only a remuneration for wear and tear was allowed where the service was performed by boats from the shore.[2]

Compensation was entirely refused to the owners where the vessel was abandoned at sea, and the crew in the boats fell in with another vessel which was also abandoned, and which they saved.[3] If a vessel is met with short-handed at sea, and assistance is rendered by sending some men on board, this is a salvage service, as we have seen, but yet one for which the owners of the vessel rendering assistance, are entitled to some compensation, but not to a great one unless the assistance thus rendered materially weakened their own vessel.[4] If the vessel is engaged in a lucrative employment at the time of rendering a salvage service, this of course is an essential ingredient in estimating the compensation to be awarded to the owners; but if not actually engaged, it has been held that no allowance is to be made for what she might have earned.[5]

Even if actually engaged at the time, if the vessel to which the service is rendered is not then in imminent danger, it is said that no compensation is to be made for any loss of profits unless the master of the vessel saved is informed at the time of the nature of the employment in which the salvor is engaged.[6]

The master has, perhaps commonly in our courts, about twice as much as the mate; but here, and still more as to the seamen, it can hardly be said that there is a rule. The share of an apprentice

perform a salvage service are entitled to a liberal compensation. One half of the amount decreed was allowed in The Howard, cited 3 Hagg. Adm. 256, and in The Earl Grey, 3 Hagg. Adm. 363; and in The Beulah, 1 W. Rob. 477, over four fifths were allowed. In The Spirit of the Age, 1 Swabey, Adm. 286, the court allowed the damage done to the vessel and a reasonable sum for the loss of services to be deducted before division, and then allowed the owners one half of the moiety, remarking that after such deductions more than a moiety was never allowed.

[1] The Mulgrave, 2 Hagg. Adm. 77.

[2] The Charlotte, 3 W. Rob. 68. But in The Norden, 1 Spinks, Adm. 185, it was held that owners of fishing smacks were entitled to salvage, although the service was of short duration and not dangerous.

[3] The Two Friends, 2 W. Rob. 349.

[4] Williamson *v.* The Brig Alphonso, 1 Curtis, C. C. 376, 380. And see cases cited ante, p. 613, n. 8.

[5] The Louisa, 3 W. Rob. 99.

[6] The Nicolai Heinrich, 22 Eng. L. & Eq. 615; The Hedwig, 1 Spinks, Adm. 19.

is given to him and not to his master,[1] and an agreement to the contrary would be void;[2] and slaves, it would seem, are entitled to salvage for their own use.[3] If some of the salvors decline or refuse to claim salvage, this will not enure to the benefit of the co-salvors, but to the benefit of the owners of the property.[4]

SECTION VII.

ON WHAT PROPERTY SALVAGE IS ALLOWED.

Salvage is generally decreed on all the property saved, whether ship, cargo,[5] or freight.[6] It is allowed on public property, and

[1] Mason *v.* Ship Blaireau, 2 Cranch, 240; The Two Friends, 2 W. Rob. 349; The Columbine, 2 W. Rob. 186. In this last case additional compensation was made to the owners of the vessel, on the ground that although the owner was not entitled to receive the whole benefit of the apprentice's services, yet that to a certain extent the owner was entitled to derive benefit from it. But the language used by the learned judge in the subsequent case of The Two Friends, is not consistent with the master's claim in any case.

[2] The Columbine, 2 W. Rob. 186.

[3] In Small *v.* Goods, etc., 2 Pet. Adm. 284, 287, salvage was decreed to slaves for their own use. But in Mason *v.* Ship Blaireau, 2 Cranch, 240, it was adjudged to the master, he having agreed to manumit the slave and to pay him one fifth of the sum allowed.

[4] Evans *v.* Ship Charles, 1 Newb. Adm. 329.

[5] Where a salvage service is concluded at one port and the cargo is taken to another and sold, the value at the former port is to be taken. The George Dean, 1 Swabey, Adm. 290. The cargo in this case was sent on from Lisbon to London, it being represented that it could not be sold at Lisbon. The court said: "I imagine the strict method to arrive at the value of the cargo at Lisbon would be, not on any assertion of its being unsalable there, but by putting it at 7*l.* and 8*l.* per cent. less than the proceeds of its sale in London, deducting freight and other charges for the voyage from Lisbon to London, but allowing a *pro rata* freight as far as Lisbon." When the cargo is saved, suit should be brought against it as well as the ship, as the proper mode of apportioning the salvage is to take the value of both, and if the value of the cargo does not appear, the court will not be able without much difficulty to apportion the salvage. The Mary Pleasants, 1 Swabey, Adm. 224.

[6] In The Peace, 1 Swabey, Adm. 85, where an action was entered against the vessel and her freight, but as the cargo had been delivered, only the vessel was arrested, and bail was given for both ship and freight, the court held that the owners of the vessel were bound to bring in an account of freight on oath, and to set forth when, and the names of the parties by whom, such freight had been paid.

all goods of the government pay the same rate as if they were owned by individuals.[1] But there is an exception to this rule in favor of the mails,[2] and perhaps in the case of a ship of war belonging to our own government.[3] And it has been determined in this country, that vessels of war belonging to a foreign neutral power cannot be arrested in our ports into which they have lawfully come.[4]

The same is true of a private armed vessel sailing under a commission from a foreign government.[5] But the general rule is that our courts have jurisdiction over all property to whomsoever it belongs, which comes within their territorial jurisdiction; and though an exception is made in favor of an armed vessel, and her munitions of war, yet the private property of a foreign sovereign, or the prize property which a vessel of war brings into our ports comes within the general rule and not within the exception.[6]

We should therefore say that where the court could take jurisdiction it would enforce a salvage claim but not otherwise.[7] Salvage is not however allowed on the clothing left by the master and crew on board of the vessel, which they abandon, but this should be returned, free of charge.[8] Nor on money found on the person of a drowned man.[9] Nor, it is said, for saving from a wreck, bills of exchange, or other evidences of debt or documents of title.[10] It has also been held, that admiralty will not allow, in a suit for salvage, charges made by the salvors for

[1] The Lord Nelson, Edw. Adm. 79; The Marquis of Huntly, 3 Hagg. Adm. 246. The law is the same in general average. See ante, Vol. I. p. 324, n. 2.

[2] Sch. Merchant, cited in Marvin on Salvage, 132.

[3] This was so held in England in 1816, in the case of The Comus, cited 2 Dods. 464.

[4] The Sch. Exchange v. M'Faddon, 7 Cranch, 116.

[5] L'Invincible, 1 Wheat. 238.

[6] The Santissima Trinidad, 7 Wheat. 283.

[7] In The Prins Frederik, 2 Dods. 451, this question was discussed at length, but no decision was given, as the foreign government afterwards consented that the judge of the admiralty court might determine the amount of salvage due.

[8] The Rising Sun, Ware, 378.

[9] The Amethyst, Daveis, 20, 29. The expense of his interment was, however, allowed out of this money.

[10] The Emblem, Daveis, 61.

repairs; but this we should think could not always be true, when these repairs were necessary, and properly made.[1]

The rights of co-shippers are sometimes quite distinct. The goods of each shipper paying the salvage decreed for saving his goods only, if there be any difference in the facts, circumstances or merits attending the saving of different parcels of the cargo.[2] But it would seem that no difference is to be made between the ship and cargo. The value of the one is to be added to the value of the other and a proportion of this amount is to be given.[3]

SECTION VIII.

OF THE MANNER IN WHICH A CLAIM FOR SALVAGE MAY BE BARRED.

If assistance is rendered to a vessel under circumstances which would generally constitute it a salvage service, it may yet not be such; as where the service is rendered under a custom to give assistance gratuitously in similar instances, or where the aid is given under a special contract. And even after the right of action has accrued it may be lost by misconduct or by a lapse of time. We shall consider these in their order.

If two vessels sail as consorts and under an agreement to assist each other, neither can claim salvage for assistance rendered to the other.[4] It has been questioned, whether if two ships be owned by one owner or by the same parties, and one of them relieves the other in distress, the relieving ship can claim salvage.[5]

And it has been held if a vessel, owned by the person to whom another vessel is chartered renders assistance to that vessel, and both vessels are under the control of the owner of the saving

[1] The Rainger, 2 Hagg. Adm. 42. This decision seems to have proceeded on the ground that the admiralty had no jurisdiction over a shipwright's bill.

[2] See The Samuel, 4 Eng. L. & Eq. 581; Stephens *v.* Bales of Cotton, Bee, Adm. 170.

[3] The Vesta, 2 Hagg. Adm. 189; Montgomery *v.* The T. P. Leathers, 1 Newb. Adm. 421.

[4] The Zephyr, 2 Hagg. Adm. 43.

[5] The Margaret, 2 Hagg. Adm. 48, note.

vessel, he appointing the officers and crew, that no salvage is due, the crews of both vessels being considered as his servants.[1]

The East India Company have been held to pay salvage to a ship which they had chartered and employed, for the salvage services rendered to another ship which was their property. The officers and crew of the chartered ship being appointed by its owner,[2] and not by the East India Company.

It has been questioned whether a custom to render assistance might not be such and so proved as to bar a claim for salvage. We should say that even where vessels sailing together are not consorts nor owned by the same party, it is possible that there may be a usage of mutual help, which would defeat a claim of salvage,[3] and under such circumstances such a claim would be materially diminished, even if no usage were proved.[4] Thus it is said that if a steamer be stranded on a sand bank in the Mississippi, and another steamer draws her off, usage prohibits any claim for salvage.[5]

But a custom of one port that vessels shall assist each other gratuitously is not binding on vessels of other ports rendering assistance to vessels of the port where the custom exists.[6] And we should doubt whether a custom that steamers should aid sailing vessels, and *vice versa*, would be good, there being no mutuality between the two classes of vessels.[7]

If at the time of the service the salvors make a bargain with the owners of the property in peril, or their servants, as to the

[1] The Maria Jane, 1 Eng. L. & Eq. 658.

[2] The Waterloo, 2 Dods. 433.

[3] The Harriot, 1 W. Rob. 439. This was a case of salvage in the South Sea, rendered by one whaling vessel to another. The service was not denied, but the respondents contended that a custom existed in the South Sea Fishery for vessels to render assistance to each other gratuitously. Such a custom being proved to exist, Dr. Lushington held that it was legal. But such a usage does not apply to the case of a whaling vessel being frozen up in Davis' Straits, and another whaling vessel sailing from England for the purpose of rescuing her. But in such a case, government bounty having been granted for the rescue of the vessel, the claim of the salvors for demurrage and the payment of stores was not allowed by the court. The Swan, 1 W. Rob. 68.

[4] The Ganges, 1 Notes of Cases, 87; The Trelawney, 4 Rob. Adm. 223, 227; The Waterloo, 2 Dods. 433, 443. But see Williamson *v.* The Brig Alphonso, 1 Curtis, C. C. 376.

[5] Montgomery *v.* Steamboat T. P. Leathers, 1 Newb. Adm. 421, 429.

[6] The Red Rover, 3 W. Rob. 150.

[7] See The Africa, 1 Spinks, Adm. 299.

amount of salvage, this is enforced by the court only so far as it seems equitable and conformable to the merits of the case. And it is wholly disregarded if it be deemed unconscionable and oppressive to the owners of the property saved, or entered into under circumstances which amount to compulsion.[1]

The salvors may also make an agreement with the master of the vessel for a compensation which falls far short of that due for a salvage service, and such a contract is enforced and considered as a bar to salvage service, "provided there be a clear understanding of the nature of the agreement; that it is made with fairness and impartiality to all concerned; and that the parties to it are competent to form a judgment as to the obligations to which they are binding themselves.[2] But, in the language of Dr. *Lushington*, in order to bar a salvage claim, there must be a distinct agreement between the parties, for a given sum and in explicit terms.[3] Mere loose conversation between the parties concerning compensation is, therefore, disregarded.[4] But it is no objection to an agreement that it was verbal, and the court will not set it aside, unless it is wholly inequitable, although it is a hard bargain.[5] And if a proposal is made by the salvors and refused by the vessel, this is no evidence, in a suit by the salvors, of the value of their service.[6] So if an agreement is afterwards rescinded by mutual consent.[7]

[1] Williams *v.* Barge Jenny Lind, 1 Newb. Adm. 443, where an agreement that the salvor should have half of the property saved was set aside. See also, The Sch. Emulous, 1 Sumner, 207; Bearse *v.* Pigs of Copper, 1 Story, 314; Post *v.* Jones, 19 How. 150; Cowell *v.* The Brothers, Bee, Adm. 136; Schutz *v.* Ship Nancy, id. 139. What we consider to be the true rule, is stated in the case of Eads *v.* The Steamboat H. D. Bacon, 1 Newb. Adm. 274, 280, "that a contract should be presumed, *primâ facie*, to be fair; but if proven to be unconscionable, the court of admiralty, like the court of equity, would refuse to enforce it."

[2] The True Blue, 2 W. Rob. 176; The Henry, 2 Eng. L. & Eq. 564; The Resultatet, 22 Eng. L. & Eq. 620; Parker *v.* Brig Whitaker, U. S. D. C., Mass., 18 Law Reporter, 497. In the case of The British Empire, 6 Jurist, 608, Dr. *Lushington* said: "Now the general principle with respect to such agreements I apprehend to be this, that it lies upon the party setting it up to prove two things, first that such agreement was made and secondly that it was just. Where there has been a definite, distinct agreement, with ample time for the parties to consider what they are doing, the court would be reluctant to interfere with it, but only under these circumstances."

[3] The Wm. Lushington, 7 Notes of Cases, 361.

[4] The Salacia, 2 Hagg. Adm. 262, 265.

[5] The Fire-Fly, 1 Swabey, Adm. 240.

[6] The Jan Hendrik, 1 Spinks, Adm. 181.

[7] The Africa, 1 Spinks, Adm. 299.

It has been held that if a vessel is hired to do a stated service, as to tow a dismasted vessel which is anchored in a dangerous situation to a place of safety, but no price is named, because the time it may take is not altogether certain, this is a salvage service, and the agreement is of no avail.[1] We cannot, however, assent to this doctrine; because we are unable to see why the parties may not make a valid contract leaving the price to be determined on the doctrine of a *quantum meruit.* It has, however, been said that an agreement of any kind does not alter the nature of the service as a salvage service, but only furnishes the rule by which the court is to be governed in awarding the compensation;[2] and that it is in this way that admiralty takes cognizance of an agreement to perform the service.[3]

A binding agreement to take the ship to a place of safety includes the cargo on board, and any agreement that separate salvage should be allowed for the cargo would not be binding,[4] except, we presume, where the cargo is taken out, and additional expense in this way incurred.

Where there is an agreement to tow a disabled vessel from one place to another, for an extra compensation, the court will not increase the sum agreed upon because of some additional assistance rendered.[5] But where some material circumstance is

[1] Hennessey *v.* Ship Versailles, 1 Curtis, C. C. 353; The Independence, 2 Curtis, C. C. 350. We consider ourselves justified in our doubt of the doctrine of these cases, because when the latter one was taken up to the Supreme Court of the United States, that court were equally divided in opinion, as appears by the report of the case on another point. Hemmenway *v.* Fisher, 20 How. 255. In The William Lushington, 7 Notes of Cases, 361, Dr. *Lushington* held where the owners of a vessel in distress agreed with the owner of a cutter that it should go to the relief of the vessel, but no sum was fixed as compensation, that the master and crew of the cutter, who did not know of the agreement, were not bound by it, but might sue as salvors. In such a case, even if it were held that the persons hired could maintain an action for salvage, it would seem just that the party with whom the contract was made should be a party to the suit, and the court would decree as salvage the amount agreed upon, so that the owner of the property saved would not be obliged to pay for the service more than once. See Parker *v.* Brig Whitaker, U. S. D. C., Mass., 18 Law Reporter, 497.

[2] The Sch. Emulous, 1 Sumner, 207.

[3] The A. D. Patchin, 1 Blatchf. C. C. 414. See also, The Catherine, 6 Notes of Cases, Supp. xliii; Bearse *v.* Pigs of Copper, 1 Story, 314, 323.

[4] The Westminster, 1 W. Rob. 229.

[5] The Kilby, 26 Eng. L. & Eq. 596, note; The Betsey, 2 W. Rob. 167. It was also held in this latter case that "whoever takes upon himself to establish the fact that an

concealed,[1] or where an ordinary towage service is commenced at an agreed sum and an extraordinary service is rendered, the agreement is set aside.[2] And where several contracts for salvage services have been made at different times, and a subsequent salvage in respect to the same property is performed under no definite contract, the rate fixed in the prior contracts is not imperative.[3]

It is perfectly well settled and for obvious and strong reasons, that any gross misconduct[4] on the part of salvors, and especially any embezzlement of the property saved,[5] forfeits the whole claim of the party who is personally guilty or participant of the wrongdoing; but not of innocent co-salvors.[6] Salvors have so much

admitted agreement has been invalidated by consent of parties, is bound to prove, by clear preponderance of testimony, that it was so cancelled."

[1] The Kingalock, 1 Spinks, Adm. 263, 26 Eng. L. & Eq. 596. In this case the agreement was set aside because the master of the vessel saved omitted to state, that he had just lost an anchor and cable. But in The Jonge Andries, 1 Swabey, Adm. 226, the court held that the master was not bound to point out every circumstance that had occurred during the voyage, but that there must be a concealment on purpose, of a circumstance of importance to have this effect. This case was affirmed on appeal in the Privy Council, 1 Swabey, Adm. 303. The value of the property saved has nothing to do with the question whether the agreement is binding or not; and Dr. *Lushington* in one case said: "Salvors are not entitled to make an agreement upon any other grounds than these: The extent of danger to which the property to be salved is exposed, the degree of labor they will have to undergo, the risk to which they themselves may be exposed, and the length of time to be occupied; but they are not to speculate on the value of the cargo." The Henry, 2 Eng. L. & Eq. 564.

[2] The William Brandt, 2 Notes of Cases, Supp. lxvii. If a towage service is commenced by a steam-tug, which breaks down in the progress of the service, and the towage is completed by other tugs belonging to the same company, the original contract is not annulled, and it seems that the acceptance of the service by the master of the vessel in tow is a continuation of the original contract. The Lady Flora Hastings, 3 W. Rob. 118. Where a vessel at sea was met with by a fishing smack, and an agreement entered into to pilot the vessel into port, and "to sail ahead" of her for an agreed sum, the court held that more than the agreed sum could not be claimed, although the smack was obliged to tow the vessel. The Jonge Andries, 1 Swabey, Adm. 226, affirmed on appeal, 1 Swabey, Adm. 303.

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[5] Schooner Dove, 1 Gallis. 585; The Bello Corrunes, 6 Wheat. 152.

[6] Mason *v.* Ship Blaireau, 2 Cranch, 240. And if a master who is also a part-owner, embezzles property, his shares as owner and as master are forfeited. Schooner Boston, 1 Sumner, 328. And it has been contended that the captain is so far the agent of the owners that they are not entitled to salvage if he embezzles property, but this position

in their power, that it is quite important to hold them strictly to their duty of protecting and preserving the property, for the benefit of their owners, with all reasonable diligence and care, and with entire honesty.[1] And this responsibility of the salvors continues as long as the property is subject to the decree of the court. So that an embezzlement or theft, after it is in custody of the officers of the court still works a forfeiture.[2] But salvage is not forfeited by misconduct of the crew before the salvage, or, probably, after, if nothing wrong can be imputed to them in connection with the salvage service, or the property.[3]

If property which has been embezzled after having been saved, comes again into the possession of the owner of it, salvage on it is due to those of the original salvors who had nothing to do with the embezzlement.[4] But any neglect or want of due skill or care on their part, would forfeit or diminish their salvage.[5] Whether they might not be answerable farther for mischief caused by their interference with the property, has not been decided. We should say, however, that they would be liable as other wrong-doers; that is, on the same ground and to the same extent.

The duties of parties when a pilot is on board in charge of a vessel we have already considered,[6] and only remark here that a salvor

cannot be maintained. The Rising Sun, Ware, 378; The Bark Missouri, U. S. D. C., Mass., 18 Law Reporter, 38. The question was discussed at length in this case, whether a conspiracy, fraud and actual embezzlement on the part of the master would defeat the claim of the owners of the vessel, the property having been saved. The court were of the opinion that only the guilty parties should suffer. The Duke of Manchester, 2 W. Rob. 470, to the contrary, may be explained on two grounds, either that the innocence of the owners was not proved, or that no beneficial service was rendered.

[1] In The John Perkins, U. S. D. C., Mass., 19 Law Reporter, 490, 496, the share of a salvor was diminished because he was not sufficiently watchful in preventing third persons from plundering the vessel.

[2] Schooner Boston, 1 Sumner, 328.

[3] The Centurion, Ware, 477, 484.

[4] The Bark Missouri, U. S. D. C., Mass., 18 Law Reporter, 38.

[5] The Rosalie, 1 Spinks, Adm. 188, 25 Eng. L. & Eq. 605; The Lockwoods, 9 Jurist, 1017; The Bark Dygden, 1 Notes of Cases, 115; The Neptune, 1 W. Rob. 297; The Duke of Manchester, 2 W. Rob. 470; The Barefoot, 1 Eng. L. & Eq. 661; The Glory, 2 Eng. L. & Eq. 551; The Dosseitei, 10 Jurist, 865; The Cape Packet, 3 W. Rob. 122. In this last case it is said that the extent of the diminution is not measured by the amount of loss or injury sustained, but is framed upon the principle of proportioning the diminution to the degree of negligence, not to the consequences."

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the general principles of law.[1] And it has been said in England, that military salvage being fixed by law at a low rate, may be increased by the court, when special services are rendered.[2]

Lord *Stowell* has held that the master and crew are, strictly speaking, the only salvors; the owners having generally, but a slight claim, grounded only on the danger incurred by their property.[3] But every one concerned in the rescue of a captured ship has a lien on the property for his salvage, and his action *in personam* as well as *in rem*.[4] In England it is no part of the duty of the crew, as seamen, to rescue their own ship in case of capture;[5] but rescue is a voluntary and meritorious act, to be rewarded as

where no restoration would be made by the alien friend under like circumstances, or where a different provision is made by treaty. The fourth section provides for the manner of distributing the salvage among the officers and crew of the recapturing vessel. It has been held under the first section, that only one sixth of the cargo is to be given in case of its recapture by a private armed vessel, although the vessel recaptured was originally an armed vessel. The Sch. Adeline, 9 Cranch, 244. See also the same case for the construction of the third section.

[1] Talbot *v.* Seeman, 1 Cranch, 1. This was a case of a recapture by an American vessel of a Hamburg vessel from a French vessel. France and the United States were at war, and Hamburg was neutral to both. The court held that the case did not fall within the third section of the act of 1800, construing that section to apply only to the case of a friend hostile to the capturing power. One sixth was allowed as salvage.

[2] The Sir Francis Burton, 2 Hagg. Adm. 156.

[3] The San Bernardo, 1 Rob. Adm. 178.

[4] The Two Friends, 1 Rob. Adm. 271.

[5] In England, the law is, that the obligation of the crew is at an end on a capture taking place. The Two Friends, 1 Rob. Adm. 271; The Beaver, 3 Rob. Adm. 292. They may therefore be entitled to salvage on recapture, as well as where the service is performed by third persons. But in this country it is certain that it is the duty of the crew to remain by the vessel after capture until condemnation. It would therefore seem that they did no more than their duty in recapturing the vessel. In Phillips *v.* M'Call, 4 Wash. C. C. 141, the vessel had been captured and a prize crew put on board; but on another vessel approaching, the captors, fearing recapture, left the vessel in the possession of part of her original crew, they giving a ransom bill, promising to pay half the value. It was held that the crew were not entitled to salvage, their contract not being dissolved by the capture. But in Clayton *v.* Ship Harmony, 1 Pet. Adm. 70, salvage was allowed on a recapture by the crew, their contract being considered to be at an end. In Williams *v.* Suffolk Ins. Co., 3 Sumner, 270, the question was whether a decree of the admiralty court in Connecticut, giving salvage to the crew of a vessel who had recaptured her when she was illegally detained by a foreign power, was binding upon the insurers. Mr. Justice *Story* held that the decree was conclusive, and added: "If that decree were reëxaminable, there is no question that it was rightfully a case for salvage; for the recapture saved the vessel and outfits from an imminent peril of condemnation."

such. If one does only his duty, he cannot on this ground claim military, any more than civil salvage;[1] and this is sometimes said where the service rendered is not so strictly within his duty, but that he might have refused to perform it.[2] Nor is it necessary that the salvor should incur personal risk; thus where the enemy sells[3] or gives[4] a captured ship to a stranger who brings her back to her owner, his right to salvage is unquestionable.

As to freight, it has been held, that this must contribute to salvage, when a commencement of the voyage has taken place, then a capture, and a recapture, by which the voyage was afterwards accomplished. In that case the whole freight is included in the valuation on which salvage is given.[5] But it is not always sufficient to make the freight contributory that its earning was made possible by the recapture; as if a ship be cut out of port and then recaptured and she afterwards sails on and completes her voyage; no salvage would be due from the freight.[6]

When there is a recapture by a public ship of war, and the parties do not consent to appraisement, the value of the recaptured property must be ascertained by a sale of it.[7] Recapture to give the right to salvage must be legal, for if founded on a tort no compensation is due.[8]

Whether salvage is to be decreed or not in cases of recapture, is often a question of much difficulty, and one of mingled law and fact. So far as the principal cases may aid in answering this question, we have arranged them as follows: —

Military salvage has been decreed, and the vessel restored to the original owner, because the condemnation and sale under which

[1] See note, supra.

[2] See Phillips *v.* M'Call, 4 Wash. C. C. 141, where it was held that a passenger, and another person who was the ship's physician, were bound to aid in rescuing the vessel after capture.

[3] The Henry, Edw. Adm. 192. In The London, 2 Dods. 74, the captors offered to release the vessel to the master on condition of his drawing a bill for £1,000, payable in London. He did this, but took care to send advices to London in time to prevent the payment. Held, that he was entitled to salvage.

[4] The Sir Peter, 2 Dods. 73.

[5] The Dorothy Foster, 6 Rob. Adm. 88.

[6] The Dorothy Foster, 6 Rob. Adm. 88, 91, per Sir William *Scott*.

[7] Cross *v.* Brig Dolphin, Bee, Adm. 152.

[8] Davison *v.* Seal-skins, 2 Paine, C. C. 324.

it was purchased and brought home were set aside as illegal.[1] Nor is the right of salvage taken away by a subsequent capture and condemnation in an enemy's port when that sentence is overruled and annulled by the sovereign of the State, and the ship released.[2] Salvage was allowed when a ship of war of the United States recaptured from the French a Hamburg ship, France and the United States being then at war, and France and Hamburg neutral as to each other, it being considered that although France and Hamburg were neutral, yet the conduct of the French government showed that the rights of nations would have been violated had the vessel been taken in.[3] And when an American vessel was captured by a French privateer, and her master gave a ransom bill, payable only on her arrival in Havana, whereupon she was ordered to Havana with a French prize-master on board, and an English ship captured her and put a prize crew on board, who brought her into her American port; it being apparent that this bill was no longer payable and was saved to the owner by the recapture, salvage was decreed.[4]

So also, when a captured ship had been abandoned by the captors, to go in pursuit of another prize; and it was afterwards found by another vessel in a derelict condition, one half was given to the salvors.[5] When an English privateer finding enemy's (French) property on board a neutral ship (an American) captured her, and put two men only on board, and the neutral master promised to go into a British port, but he afterwards attempted to go into an enemy's port, and the prize crew besought the aid of another British armed ship, who again captured the neutral, it was held, that the first seizure constituted a legal capture, but that the services of the cruiser were sufficient to entitle her to a salvage.[6] Salvage is allowed in case of a recapture from pirates.[7]

[1] The Flad Oyen, 1 Rob. Adm. 135.

[2] The Charlotte Caroline, 1 Dods. 192.

[3] Talbot *v.* Seeman, 1 Cranch, 1; The War Onskan, 2 Rob. Adm. 299.

[4] Moodie *v.* Brig Harriet, Bee, Adm. 128.

[5] The Lord Nelson, Edw. Adm. 79. The question seems to have been considered more as a case of derelict, than as salvage on recapture.

[6] The Resolution, 6 Rob. Adm. 13.

[7] The Marianna, 3 Hagg. Adm. 206. See also, Davison *v.* Seal-skins, 2 Paine, C. C. 324; The Calypso, 2 Hagg. Adm. 209.

Restoration was decreed without salvage, in the following cases. In a case of a capture by a foreign cruiser, which was fitted out in a port of the United States in violation of our neutrality, the capture being considered as illegal.[1] Nor was salvage allowed for merely stopping a ship from entering an enemy's port, for there can be no salvage for recapture, unless the property has been in the actual or constructive possession of the enemy;[2] and the recaptured ship must come into the *actual* possession of the recaptors; but in one such case, salvage was decreed under the general maritime law, although the case did not come within the English prize act.[3]

If the vessel does not actually assist in the recapture, she is not entitled to salvage, as where she is prevented from assisting by becoming becalmed.[4] So also, where an American ship was captured by the enemy and condemned, and sold to a subject of the enemy, and afterwards recaptured by an American privateer; because by the general maritime law, a sentence of condemnation extinguishes the title of the original proprietor.[5] So also, where an American ship was seized by French custom-house officers and released on bail, to respond adjudication in the French prize court, and was captured by English ships as she was dropping down the river; on the ground, that she was already out of the enemy's hands, and no service was rendered to her.[6] Salvage was not allowed for rescuing a neutral American ship from a belligerent, who arrested her for an alleged breach of treaty or of the law of nations.[7] A neutral vessel can claim no salvage for a recapture from a belligerent, because it

[1] The Brig Alerta, 9 Cranch, 359.

[2] The Ann Green, 1 Gallis. 274, 293.

[3] The Edward and Mary, 3 Rob. Adm. 305. The vessel in this case, was brought to by a French lugger in a storm, but was not boarded on account of the weather. A British frigate came in sight and captured the lugger, and the vessel escaped and arrived safely in port. The act of parliament declared that "if at any time afterwards surprised and retaken by any of his majesty's ships of war," etc. This was held to make an actual possession by the recaptors necessary.

[4] The Dorothy Foster, 6 Rob. Adm. 88.

[5] The Star, 3 Wheat. 78.

[6] The Robert Hale, Edw. Adm. 265.

[7] Waite *v.* Brig Antelope, Bee, Adm. 233; Talbot *v.* Seeman, 1 Cranch, 1; The War Onskan, 2 Rob. Adm. 299.

amount of salvage, this is enforced by the court only so far as it seems equitable and conformable to the merits of the case. And it is wholly disregarded if it be deemed unconscionable and oppressive to the owners of the property saved, or entered into under circumstances which amount to compulsion.[1]

The salvors may also make an agreement with the master of the vessel for a compensation which falls far short of that due for a salvage service, and such a contract is enforced and considered as a bar to salvage service, "provided there be a clear understanding of the nature of the agreement; that it is made with fairness and impartiality to all concerned; and that the parties to it are competent to form a judgment as to the obligations to which they are binding themselves.[2] But, in the language of Dr. *Lushington*, in order to bar a salvage claim, there must be a distinct agreement between the parties, for a given sum and in explicit terms.[3] Mere loose conversation between the parties concerning compensation is, therefore, disregarded.[4] But it is no objection to an agreement that it was verbal, and the court will not set it aside, unless it is wholly inequitable, although it is a hard bargain.[5] And if a proposal is made by the salvors and refused by the vessel, this is no evidence, in a suit by the salvors, of the value of their service.[6] So if an agreement is afterwards rescinded by mutual consent.[7]

[1] Williams *v.* Barge Jenny Lind, 1 Newb. Adm. 443, where an agreement that the salvor should have half of the property saved was set aside. See also, The Sch. Emulous, 1 Sumner, 207; Bearse *v.* Pigs of Copper, 1 Story, 314; Post *v.* Jones, 19 How. 150; Cowell *v.* The Brothers, Bee, Adm. 136; Schutz *v.* Ship Nancy, id. 139. What we consider to be the true rule, is stated in the case of Eads *v.* The Steamboat H. D. Bacon, 1 Newb. Adm. 274, 280, "that a contract should be presumed, *primâ facie*, to be fair; but if proven to be unconscionable, the court of admiralty, like the court of equity, would refuse to enforce it."

[2] The True Blue, 2 W. Rob. 176; The Henry, 2 Eng. L. & Eq. 564; The Resultatet, 22 Eng. L. & Eq. 620; Parker *v.* Brig Whitaker, U. S. D. C., Mass., 18 Law Reporter, 497. In the case of The British Empire, 6 Jurist, 608, Dr. *Lushington* said: "Now the general principle with respect to such agreements I apprehend to be this, that it lies upon the party setting it up to prove two things, first that such agreement was made and secondly that it was just. Where there has been a definite, distinct agreement, with ample time for the parties to consider what they are doing, the court would be reluctant to interfere with it, but only under these circumstances."

[3] The Wm. Lushington, 7 Notes of Cases, 361.

[4] The Salacia, 2 Hagg. Adm. 262, 265.

[5] The Fire-Fly, 1 Swabey, Adm. 240.

[6] The Jan Hendrik, 1 Spinks, Adm. 181.

[7] The Africa, 1 Spinks, Adm. 299.

It has been held that if a vessel is hired to do a stated service, as to tow a dismasted vessel which is anchored in a dangerous situation to a place of safety, but no price is named, because the time it may take is not altogether certain, this is a salvage service, and the agreement is of no avail.[1] We cannot, however, assent to this doctrine; because we are unable to see why the parties may not make a valid contract leaving the price to be determined on the doctrine of a *quantum meruit.* It has, however, been said that an agreement of any kind does not alter the nature of the service as a salvage service, but only furnishes the rule by which the court is to be governed in awarding the compensation;[2] and that it is in this way that admiralty takes cognizance of an agreement to perform the service.[3]

A binding agreement to take the ship to a place of safety includes the cargo on board, and any agreement that separate salvage should be allowed for the cargo would not be binding,[4] except, we presume, where the cargo is taken out, and additional expense in this way incurred.

Where there is an agreement to tow a disabled vessel from one place to another, for an extra compensation, the court will not increase the sum agreed upon because of some additional assistance rendered.[5] But where some material circumstance is

[1] Hennessey *v.* Ship Versailles, 1 Curtis, C. C. 353; The Independence, 2 Curtis, C. C. 350. We consider ourselves justified in our doubt of the doctrine of these cases, because when the latter one was taken up to the Supreme Court of the United States, that court were equally divided in opinion, as appears by the report of the case on another point. Hemmenway *v.* Fisher, 20 How. 255. In The William Lushington, 7 Notes of Cases, 361, Dr. *Lushington* held where the owners of a vessel in distress agreed with the owner of a cutter that it should go to the relief of the vessel, but no sum was fixed as compensation, that the master and crew of the cutter, who did not know of the agreement, were not bound by it, but might sue as salvors. In such a case, even if it were held that the persons hired could maintain an action for salvage, it would seem just that the party with whom the contract was made should be a party to the suit, and the court would decree as salvage the amount agreed upon, so that the owner of the property saved would not be obliged to pay for the service more than once. See Parker *v.* Brig Whitaker, U. S. D. C., Mass., 18 Law Reporter, 497.

[2] The Sch. Emulous, 1 Sumner, 207.

[3] The A. D. Patchin, 1 Blatchf. C. C. 414. See also, The Catherine, 6 Notes of Cases, Supp. xliii; Bearse *v.* Pigs of Copper, 1 Story, 314, 323.

[4] The Westminster, 1 W. Rob. 229.

[5] The Kilby, 26 Eng. L. & Eq. 596, note; The Betsey, 2 W. Rob. 167. It was also held in this latter case that "whoever takes upon himself to establish the fact that an

The greatest difficulty has been in determining the extent of the lien for repairs in a port in the same State. That there is no such lien recognized by our courts, except that which a ship-wright has at common law so long as he retains possession,[1] is very clear.[2] Most of our States have, however, passed laws giving the lien in certain cases, the laws of some States including contracts for building, and in others being limited to repairs and supplies. These statutes generally authorize a suit to enforce the lien, either in the State court or in the admiralty court sitting in that district. It is very obvious that our State legislatures have no power to confer any additional jurisdiction upon the United States courts; but the legislatures may give a lien where none before existed, and if this is in respect to a subject maritime in its nature, admiralty process should lie to enforce it. The only question then, is, whether a contract to repair or to build a vessel is a maritime contract. That the former is, there can be no doubt; that the latter is, there can likewise be no doubt on principle, but this has been doubted by the Supreme Court of the United States.[3] So far as repairs and supplies are

founded on the implied duty on the part of the ship-builder to perform the service with skill and care, and alleged that the damage resulted from negligence and want of proper skill in conducting the business. The suit was dismissed for want of jurisdiction, on the ground that the duty did not arise out of a maritime contract, it being made on land and relating to service to be performed on land. But in the case of Griffith *v.* Wortman, 19 Law Reporter, 377, the same judge said: "I do not go into the question whether this is a contract made, or service rendered, on the land or on the water; it undoubtedly partakes of both; for I am free to confess, I have not much respect for this and other like distinctions that have sometimes been resorted to for the purpose of ascertaining when the admiralty has and has not jurisdiction. The nature and character of the contract, and of the service, have always appeared to me to be sounder guides for determining the question." We do not see clearly how these cases are to be reconciled.

[1] This common-law lien has been enforced in admiralty. The Sch. Marion, 1 Story, 68, 72. See also, Peyroux *v.* Howard, 7 Pet. 324.

[2] The General Smith, 4 Wheat. 438, and cases cited ante, Vol. I. p. 492, n. 2.

[3] People's Ferry Co. *v.* Beers, 20 How. 393. The lien given by a State statute to persons building a vessel has been enforced in admiralty in numerous cases, which we have before cited, Vol. I. p. 499, note 1. See also, the case of The Richard Busteed, U. S. D. C., Mass., Oct. 1858, 21 Law Reporter, 601, decided since our first volume was in press. This case most ably reviews the whole question, and holds that the contract to build a ship is one of a maritime nature, and may be enforced in admiralty.

concerned, the jurisdiction *in rem* has been taken away by the new rule of the Supreme Court of the United States, which went into effect on the first day of May, 1859. This rule repeals the 12th admiralty rule, and is a substitute for it. It provides that "in all suits by material-men for supplies or repairs, or other necessaries for a foreign ship or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master and owner alone *in personam*. And the like proceeding *in personam*,[1] but not *in rem*, shall apply to cases of domestic ships for supplies, repairs, or other necessaries."[2]

We do not see, however, that this rule touches the question of ship-building, or differs in any way from the former rule, except that the words "*in personam* but not *in rem*" are added in the new rule, and the words "where by the local law a lien is given to material-men," which occurred in the old rule after the words "domestic ships," are omitted.[3] The old 12th rule was in force at the time our first volume was printed, and we refer to it on page 501. The effect of its repeal, and of the new rule, cannot certainly be known until it be fixed by adjudication. We are of the opinion, however, that the new rule permits actions *in personam* "for supplies, repairs, or other necessaries," furnished to domestic ships, whether the right of action is given by local law or not, and prohibits actions *in rem* whether given by local law or not.

If this be the intention of the Supreme Court of the United States, or the effect of their rule as applied by the district courts,

[1] Previous to this rule, it had been decided that under the 12th old admiralty rule, no action *in personam* would lie in the case of a domestic vessel. Merritt *v.* Sackett, U. S. D. C., Western District of New York, 12 Law Reporter, 511.

[2] 21 How.

[3] It will be noticed that the old rule said nothing about the case of the building of a vessel, but was confined to the case of "repairs, supplies, or other necessaries," unless, indeed, it be contended that the term "other necessaries," included building a vessel, which we should hardly suppose possible. If it did, then by the new rule the right of action is limited to a suit *in personam*. If it did not, the rule has no reference to the building of a vessel, and the only question is whether the courts can take jurisdiction over contracts made by material-men in the home port, aside from the statute. In the case of Maguire *v.* Card, 21 How. 248, 251, the court, after mentioning the new rule, said: "We have determined to leave all these liens depending upon State laws, and not arising out of the maritime contract, to be enforced by the State courts."

may it not be questioned whether it will not oppose unquestionable principles of admiralty law, which call upon the court to enforce, over a *thing* clearly within its jurisdiction and possession, maritime liens however or wherever created.[1]

In the first chapter of this book[2] we intimated a doubt whether the case of Allen *v.* Newberry[3] which decided that under the act of 1845, the admiralty courts had no jurisdiction over the domestic commerce of a State, was intended to apply to the domestic commerce of a State situated on the sea, or on waters navigable from the sea. But since that portion of our work was in press the 21st volume of Howard has been published, and in it is a case in which the court say that they regarded the restriction mentioned in the act of 1845, as declaratory of the general law, and it was decided that the court had no jurisdiction of a contract for supplies furnished to a vessel engaged exclusively in the domestic trade of the State where the supplies were furnished, although the State was on the sea-coast.[4]

The lien of a material-man like that of a sailor, has been held not to be lost if the vessel is shipwrecked, and portions of the wreck are saved by the owners.[5]

[1] See ante, p. 505, n. 1 and 2.
[2] See ante, p. 510.
[3] Allen *v.* Newberry, 21 How. 244.
[4] Maguire *v.* Card, 21 How. 248.
[5] Bruce *v.* The tackle, etc. of the Steamboat America, 1 Newb. Adm. 195.

CHAPTER IX.

OF SALE BY ORDER OF ADMIRALTY.

THIS occurs principally in cases of bottomry and of salvage, when the court always decree a sale, if necessary, to satisfy the claims which they sustain. Doubtless the same decree would be made in any suit *in rem*, against the ship, where the same necessity arose; as for wages or repairs. Wherever a sale is decreed, the court give such orders, and take such precautions as may seem necessary and proper to protect the interests of all parties; and such a sale, it would seem, conveys the property free from all prior incumbrances.[1] In judicial sales, there is no warranty either express or implied; and the proceeds when brought into court are not liable *in rem* to make good a loss sustained by the purchaser, in consequence of a defect being discovered in the article sold.[2]

In some of our States, there are statutes regulating sales of wrecked ships, and wreck commissioners appointed under them. A sale, made under these statutes, and in conformity with their provisions, in good faith, gives a title which is sustained in admiralty.[3] Even if fraudulent, it may give good title as against the owner, to an innocent purchaser, for value, who has neither knowledge nor notice, actual or constructive, of the fraud, nor of any circumstances which would defeat his title.[4] We should not hold that a sale in a proceeding *in rem* under a State statute which authorizes such a proceeding in the case of an ordinary

[1] See The Steamboat Hendrik Hudson, U. S. D. C., Northern District of New York, 17 Law Reporter, 93; The Tremont, 1 W. Rob. 163; Attorney-General *v.* Norstedt, 3 Price, 97; The Helena, 4 Rob. Adm. 3.

[2] The Monte Allegre, 9 Wheat. 616.

[3] The Sch. Tilton, 5 Mason, 465; American Ins. Co. *v.* 356 Bales of Cotton, 1 Pet. 511.

[4] The Sch. Tilton, 5 Mason, 465, per *Story*, J.

debt, would have the effect of a sale by an admiralty court.[1] But it may well be, if the lien exists only by the law of the State under which the vessel has been already sold, that it cannot be afterwards enforced against the vessel, because in this case the right which the law of the State gave has been taken away by the giver.[2]

[1] The Globe, U. S. D. C., Northern District of New York, 13 Law Reporter, 488. The vessel, in this case, had been sold under an Ohio statute which authorized proceedings against the vessel *in rem*. A suit was then commenced in the United States court to enforce the lien for materials furnished the vessel in the port of a State other than her own, prior to the proceedings in the State court, and the lien was enforced. It also appeared that the State statute had no provision for giving notice to all the world as in an admiralty proceeding *in rem*, and that in fact no notice was given, though the owner of the vessel appeared and contested the suit. Mr. Justice *Conkling* held, on this point, that such a decree, even if it had the force and effect of a decree *in rem*, would not be binding, no notice having been given. This decision was overruled by Mr. Justice *Nelson*, 15 Law Reporter, 421, 2 Blatchf. C. C. 427, but the reasons given by Mr. Justice Conkling seem to us very strong. We have little hesitation in stating the law to be, that a State cannot by changing the name or nature of the process, bind the rights of persons not parties to the suit. The decision of Mr. Justice Nelson is so severely criticized by Mr. Justice Conkling in the second edition of his treatise on Admiralty Jurisdiction, Vol. I. p. 88–102, that we do not deem it necessary to say more about it. We would, however, notice one point taken by *Nelson*, J., which we consider as opposed to the first principle of a proceeding *in rem*; namely, that notice in some form must be given to all parties interested. The objection is overcome by saying that the owner of the vessel appeared and contested the proceedings throughout. But this is surely a novel doctrine to say that therefore the rights of all parties are concluded. Since the above was written, we have met with the learned opinion of Mr. Justice *Treat*, concurred in by Mr. Justice *Catron*, in which the law is stated as follows: "The acts of the various States creating municipal liens, — providing, as many of them do, for their enforcement in suits instituted against the vessels *by name*, instead of against the owners, prescribing, too, the modes of proceeding therein, and of divesting those municipal liens, declaring the rules of priority among domestic creditors, ordering the sale of the vessel and the appearance of the specified lien creditors to urge their demands against the proceeds when brought into the State courts, do not make those proceedings properly suits *in rem*, or give to those courts admiralty powers or jurisdiction. Hence, the judicial sales made under such acts by the order of State courts, divest only the liens *created* by those acts, and the municipal liens embraced within their terms. The purchaser in such cases takes, *cum onere*, as to existing maritime liens, and as to the municipal liens of other States." Hill *v.* The Golden Gate, U. S. C. C., Missouri, 6 Am. Law Register, 273, 302. See also, Riggs *v.* The Sch. John Richards, 1 Newb. Adm. 73; Harris *v.* The Steamboat Henrietta, 1 Newb. Adm. 284; Ashbrook *v.* The Steamer Golden Gate, 1 Newb. Adm. 296.

[2] Ashbrook *v.* The Steamer Golden Gate, 1 Newb. Adm. 296. Some of the libellants, in this case, sought to enforce liens under the general maritime law, and others, liens under the statute of Missouri. The vessel had already been sold in a suit under that

As to the power of admiralty to decree a sale of a ship for wreck, unseaworthiness, decay, or any similar cause, on petition of the master and proof of the fact, there seems to be some doubt. The common-law courts of England, who do not deny the efficacy of a judicial sale by admiralty, in cases where suits are brought *in rem*, and who have held such a sale as even prevailing over the right of seizure by the crown for a previous forfeiture,[1] do, nevertheless, very positively refuse to sanction any such sale for disaster or decay, on petition of the master.[2] But Lord *Stowell* has declared that the courts of admiralty ought, in his judgment, to possess this power, and to be sustained in this exercise of it; but still held that they did not possess this power.[3] It might be expected that the admiralty of this country would assert this power. In one case it was so held; but it was also held that although the court had full power to decree such sale on the application of the master, yet it would not be conclusive against either the owner or third persons.[4] And the courts of admiralty in neither country would hold such decree of sale as conclusive on the subject; or equally conclusive with one which was made necessary by a suit *in rem*.

Closely connected with this subject is that of surveys. A survey is often a document of great value in cases of insurance and loss, and in questions of a sufficient necessity of repair to justify loans on bottomry. And when a sale has been made by a master, or still more perhaps, when a master requests the interposition of a court of admiralty, to decree or justify a sale, then the survey

statute in the State court, and the question was as to the effect of the sale. The statute declared that the boat or vessel should, in the hands of the purchaser and his assigns, be free and discharged from all previous liens and claims under the act. The court held that the vessel was not liable after the sale for the claims of those who had a lien only under the statute, but that it was liable to those who had a lien under the general maritime law.

[1] See Attorney-General *v.* Norstedt, 3 Price, 97.

[2] Reid *v.* Darby, 10 East, 143; Morris *v.* Robinson, 3 B. & C. 196.

[3] The Fanny and Elmira, Edw. Adm. 117; The Warrior, 2 Dods. 288, 293; The Pitt, 1 Hagg. Adm. 240.

[4] The Tilton, 5 Mason, 465, 474; Janney *v.* Columbian Ins. Co., 10 Wheat. 411, 418; Dorr *v.* Pacific Ins. Co., 7 Wheat. 581; Armroyd *v.* Union Ins. Co., 2 Binn. 394; Steinmetz *v.* United States Ins. Co., 2 S. & R. 293; The Dawn, Ware, 485, 487.

becomes of the highest importance.[1] It is a mercantile measure, with which all masters and merchants are familiar; and the courts of common law as well as of admiralty fully recognize its value.[2] It should be noticed, however, that no report of surveyors is itself evidence at law, unless under peculiar circumstances.[3] And if it were received as evidence in admiralty, as it would be for some purposes, its authority and efficacy would depend upon many circumstances, as upon the character of the report itself, and especially upon the careful observance of all rules and usages which are, as it were, established by the law-merchant in relation to the calling of the survey, the appointment of surveyors, the manner of their proceedings and the making up of the report, because these rules are found to be of much use in making the report correct and trustworthy. Thus, the reasons for calling the survey should be plainly set forth; it should be called by one having authority as port warden, if there be any such officer in the port, or by a consul, or commercial agent, or in the absence of these, by some one of proper standing and character. The surveyors should be responsible and skilful men, with the knowledge and experience the service requires. They should proceed carefully and examine thoroughly; and in their report detail the steps they take, and give, not their conclusions only, but their reasons for them, and the facts on which these reasons rest.[4]

To return, however, to a judicial sale of a ship, by order of admiralty, a difficult and perhaps undetermined question arises, to which we have already given some consideration. It exists when part-owners who hold a moiety in interest, petition a court of admiralty to decree a sale of a ship against the will of other and dissentient owners. By an early case in England, it appears that a suit had been instituted in admiralty by part-owners, constituting a minority in interest, praying that the ship might be sold, *or* that they might have some other remedy, as the court might deem proper; and the other part-owner applied to the

[1] The Henry, Blatchf. & H. Adm. 465. See Robinson *v.* Clifford, 2 Wash. C. C. 1.

[2] The Fortitude, 3 Sumner, 228, 261; Janney *v.* Col. Ins. Co., 10 Wheat. 411, 417; The Warrior, 2 Dods. 288; Gordon *v.* Mass. F. & M. Ins. Co., 2 Pick. 249; Orrok *v.* Commonwealth Ins. Co., 21 Pick. 456; Wright v. Barnard, 2 Esp. 700.

[3] See Hall *v.* Franklin Ins. Co., 9 Pick. 466, 477, and cases cited ante, p. 488, notes 3 and 4.

[4] See cases, *supra*.

King's Bench for a prohibition. *Lee*, Chief Justice, said: "The admiralty has no jurisdiction to compel a sale, and if they should do that, you might have a prohibition against selling or compelling the party to sell, or to buy the shares of the others." The reporter adds: "Which was agreed to *per totam curiam*, and the rule as to that was made absolute, but as to compelling a security to be given, the rule was discharged."[1] And so the law seems to be settled in England. But in this country, the current of authority, and, as we think, of reason, is in favor of the admiralty possessing this power, on the ground that it is one of the natural and essential elements of admiralty jurisdiction, which belongs to it by the common consent of the maritime world, and is expressly incorporated in many maritime codes, and was taken from or denied to admiralty in England by the King's Bench without any sufficient reason or authority. It is true that one of the ablest and most learned judges in admiralty we have ever had, refused to exercise this power and denied the jurisdiction of the court.[2] In that case the part-owners were equally divided, each of them wishing to employ the ship upon a voyage which the other disliked; and we must confine his remarks to the circumstances of the case. And when that very case was taken by appeal to the circuit court, Mr. Justice *Washington*, although declaring that when he had first read Mr. Justice *Hopkinson's* decision he was entirely satisfied with it, finally reversed the decree, and ordered the sale, being convinced by the arguments offered and a further investigation, that the court possessed the power and ought to exercise it in such a case as that then before them.[3] In the District Court of South Carolina, in 1793,[4] and in the District Court of Maine, in 1851,[5] similar decisions have been made. And Mr. Justice *Story*, in his work on Partnership,

[1] Ouston *v.* Hebden, 1 Wils. 101.

[2] Davis *v.* The Brig Seneca, Gilpin, 10. See also, Willings *v.* Blight, 2 Pet. Adm. 288.

[3] Davis *v.* The Brig Seneca, 18 Am. Jurist, 486.

[4] Skrine *v.* Sloop Hope, Bee, 2.

[5] The Vincennes, decided by Mr. Justice *Ware*, but not reported. We are informed that in this case there were three part-owners, one owning a moiety, and the other two a quarter each. The owner of the moiety was in possession, and was ship's husband, but the parties disagreed as to the voyage, and on application of the two part-owners of the one moiety, the vessel was ordered to be sold.

examines into the question, and expresses a decided opinion that the American courts of admiralty possess this power, and that it belongs essentially to their jurisdiction.[1] And upon the whole, we cannot doubt that our courts would, generally at least, adopt similar views.

After a sale is made by order of a court of admiralty, the court will not, except in a very peculiar case, set the sale aside,[2] and it is doubtful whether they would do so in any case.

[1] Story on Partnership, § 438.

[2] Pease *v.* The Propeller Napoleon, 1 Newb. Adm. 37.

CHAPTER X.

OF THE EQUITY JURISDICTION AND PRACTICE OF COURTS OF ADMIRALTY.

COURTS of admiralty are not, strictly speaking, courts of equity; thus, if a libellant disclose that his case rests upon a trust, he, in general, destroys his own right of action in admiralty, because the court cannot take cognizance of a bill in equity in the disguise of a libel in admiralty.[1] But they have still very general and extensive powers, analogous to those which belong to courts of equity, and in general govern themselves by similar principles.[2] Thus no party prevails there who does not come into court with clean hands and make out a case *ex æquo et bono*.[3] So a condemnation against one party in

[1] Davis *v.* Child, Davels, 71, 80. In Andrews *v.* Essex Fire & Marine Ins. Co., 3 Mason, 6, it was held, that although a court of admiralty had jurisdiction over a contract of insurance, yet it could not reform the policy, that being the province of a court of equity. Mr. Justice *Story* said: "To be sure, in a certain sense, and in the exercise of their general jurisdiction, courts of admiralty may be said to be courts of equity, that is, courts proceeding *ex æquo et bono*, and not confined to the narrow notions of the common law. But courts of admiralty have no general jurisdiction to administer relief as courts of equity. They cannot entertain an original bill or libel for specific performance, or to correct a mistake, or to grant relief against a fraud, though they may perhaps sometimes, like courts of law, perform what may be deemed analogous functions. They may give the same benefit, as if there were no fraud or mistake, or omission of performance; but this can be in a few cases only, which fall in all their circumstances completely within their general jurisdiction." See also, Dean *v.* Bates, 2 Woodb. & M. 87, 92; Kellum *v.* Emerson, 2 Curtis, C. C. 79. In this latter case the rule is said to be, that a court of admiralty has not the equitable jurisdiction of a court of chancery, but merely applies principles of equity to subjects within its jurisdiction. And in Kynoch *v.* The S. C. Ives, 1 Newb. Adm. 205, the court refused to decree the specific performance of a contract for the sale of a ship.

[2] In Brown *v.* Lull, 2 Sumner, 443, 449, the court said concerning mariners' contracts: "Courts of admiralty are not, by their construction and jurisdiction, confined to the mere dry and positive rules of the common law. But they act upon the enlarged and liberal jurisprudence of courts of equity; and, in short, so far as their powers extend, they act as courts of equity."

[3] In The Schooner Boston, 1 Sumner, 328, 341, *Story*, J., said: "I take it to be very

default or contumacy does not prejudice the rights of any other party to make defence on the same facts.[1] And an agreement made under a clear mistake will be set aside.[2] And after a case has been closed, it may be reopened for sufficient cause; but this, the court have said, it would be very reluctant to do.[3] In general, a far less rigorous strictness prevails in the construction of maritime contracts in courts of admiralty than in those of common law.[4]

Customs and mercantile usages are greatly regarded; but not those of a particular port or place, for these are seldom allowed

clear, according to the course of admiralty proceedings, that no person can come into that court and ask its assistance, unless he can, *ex æquo et bono*, make out a case fit for its interposition. A court of admiralty is, to the extent of its jurisdiction, at least in cases of this sort, a court of equity; and the same rule applies here, as in other courts of equity, that the party who asks aid must come with clean hands." This was said in reference to embezzlement by salvors, which, we have seen, forfeits their claim.

[1] The M ry, 9 Cranch, 126.

[2] The Hiram, 1 Wheat. 440.

[3] In The Fortitudo, 2 Dods. 58, two suits had been commenced on two bottomry bonds, the first of which was on the ship, and the second on the ship, cargo, and freight. The warrants of arrest were executed in the usual manner, and the average account between the ship, freight, and cargo made out by a third person. The bondholders objected to the amount charged for the freight. The master then consented to take their own account of freight, upon which they withdrew their actions, and a supersedeas was decreed. The master then chartered the ship anew, and she was again arrested on the same bonds. The court said: "These are the circumstances stated by the master in his affidavit, and they do not, in my apprehension at least, render it necessary that I should inquire how far the permission again to open a case which has once been closed, comes within the range of that large discretion with which this court is, by its commission, intrusted. It might, perhaps, within the limits of that very extended equity which it is in the habit of exercising, deem it not improper, in some cases, to suffer a cause to be reopened. But it certainly would not do so, unless there existed very strong reasons to show the propriety of the measure. I feel no hesitation in saying, that mere negligence or oversight would not be a sufficient ground for such an extraordinary interposition of the authority of the court. A direct case of fraud, or something equivalent to it, must be made out before I can suffer such a step to be taken." In this case the bondholders were condemned in costs and two months demurrage.

[4] The cases which show that admiralty courts give a liberal and equitable construction to the contracts which come before them, are innumerable. Most of these cases are cited, in this work, under various heads. Among them, we may refer again to the following. As to the wages of seamen and their contracts, see The Minerva, 1 Hagg. Adm. 347; The Prince Frederick, 2 Hagg. Adm. 394; The Cypress, Blatchf. and H. Adm. 83; The Triton, id. 282; The Crusader, Ware, 437; The Betsey and Rhoda, Daveis, 112; Ellison *v.* Ship Bellona, Bee, Adm. 106. As to salvage, and agreements extorted in distress, see T e Henry Ewbank, 1 Sumner, 400, and The Louisa, 2 W.

to control the general maritime law, unless they are such, and so proved that they must be taken to be a part of the contract.[1]

Rob. 22, where an agreed apportionment was set aside. As to bottomry bonds, see The Heart of Oak, 1 W. Rob. 204, 213. As to the lien of material-men, see Ramsay *v.* Allegre, 12 Wheat. 611. And as to the discretion of the court in deciding, by the maritime law, forfeitures of seaman's wages, see The Crusader, Ware, 447, and Cloutman *v.* Tunison, 1 Sumner, 373, 379.

[1] See ante, p. 56–61.

CHAPTER XI.

OF THE LAW OF ADMIRALTY IN CASES OF TORT AND TRESPASS.

THAT torts, committed upon the high seas, are within the jurisdiction of admiralty, is certain.[1] The principal cases in which it has been carried into effect, are those in which passengers have sought for compensation for ill-treatment by the captain, and similar actions by mariners, against the officers of the vessel,[2] and those in which actions have been maintained for the abduction or ill-treatment of minors.

In the first case, it is held, that passengers have a legal right, not merely to ship room, and suitable and sufficient food, but to kind and proper treatment, and a due regard to the courtesies and decencies of life; and if these are violated, the offence may be reached and damages recovered by libel in admiralty.[3]

In regard to cases of the third class, it seems to be quite certain, that a parent may maintain a libel for the abduction of his minor child, against the master,[4] or the ship-owner; even though the latter has no personal knowledge of the fact, the act of the master being held to be within the scope of his authority, as agent for the owners.[5]

[1] But this jurisdiction in civil cases seems to be confined by Mr. Justice *Story*, to acts done on the high seas, or on waters within the ebb and flow of the tide. Thomas *v.* Lane, 2 Sumner, 1. But under the decisions of our supreme court, the rule of tide waters no longer exists, and our admiralty courts have jurisdiction over some cases of tort certainly, such as collision, on all waters navigable from the sea, and on the lakes and navigable waters connecting the same. See ante, p. 502, n. 1. But whether they have jurisdiction over all torts, such as assaults, etc., to the same extent, is yet a subject for adjudication.

[2] See ante, Vol. I. p. 464, n. 2.

[3] Chamberlain *v.* Chandler, 3 Mason, 242. See also, cases ante, Vol. I. p. 394, n. 3.

[4] Steele *v.* Thatcher, Ware, 91.

[5] Sherwood *v.* Hall, 3 Sumner, 127; Luscom *v.* Osgood, U. S. D. C., Mass., 7 Law Reporter, 132; Walcott *v.* Wilcutt, same court, 1858; The Platina, same court, 21 Law Reporter, 397.

The rule of the common law, that the gist of the action consists in the loss of the services, is followed, and it may be stated as a general rule, that where an action *per quod servitium amisit* would not lie at common law, no suit can be brought in admiralty.[1]

In one case, where a minor child was shipped, with the consent of a father on a certain voyage, and the libel, brought by the father, alleged gross and cruel treatment of the child, to the injury of his health, and his subsequent death, jurisdiction was sustained, and the libel determined upon its merits.[2] On an appeal,[3] *Story*, J., denied the jurisdiction of the circuit court over the case, mainly because the libel sought compensation for positive or permissive violation of an agreement for "good, careful, tender, and parental usage," which, although in connection with services which were to be performed upon the seas, were held to render the contract one of so mixed a nature, that the admiralty could not take cognizance of it. It has, however, always seemed to us that he shrank, in this case, from the possibility of unduly extending the bounds of admiralty jurisdiction, with more than necessary caution.

[1] See Steele *v.* Thatcher, Ware, 91; Plummer *v.* Webb, Ware, 75.
[2] Plummer *v.* Webb, Ware, 75.
[3] Plummer *v.* Webb, 4 Mason, 380, 385.

BOOK IV.

ON THE PRACTICE OF ADMIRALTY.

A TREATISE

ON THE

LAW OF MARITIME PROPERTY AND CONTRACTS.

BOOK IV.

ON THE PRACTICE OF ADMIRALTY.

INTRODUCTORY.

THE leading principles and forms of admiralty jurisdiction come down from a very remote antiquity. The commerce of Rome was important, at the time when the civil law was attaining its highest excellence; and the rules and principles adopted for the legal regulation of this commerce were founded upon a clear perception and a wise consideration of the reason and justice of every case. They have survived, therefore, the Roman dominion, and their influence, not to say their authority, extends over continents unknown to Rome; and more in reference to this than any part of her law is the old saying true, that she still governs the world, but now *haud ratione imperii, sed imperio rationis.* The civil law, under that name, prevails on the continent of Europe, particularly in its maritime law; and during the many ages which have elapsed since that law was in force, *proprio vigore*, important modifications have been introduced, as, for example, the rule that freight is the mother of wages, and therefore if that

is not earned, they are not, of which rule there is no trace in the Roman civil law.[1] And now when we speak of the civil law in reference to this subject, we must be understood to refer to the European, or modern civil law; and in this way, too, we must interpret our statute of 1789, ch. 21, § 2,[2] which provides that "the forms and modes of proceeding in causes of equity, and of admiralty and maritime jurisdiction shall be according to the course of the *civil* law," which provision, three years afterwards, was altered by the statute of 1792, ch. 36, § 2,[3] which requires the same forms and modes of proceeding, etc., to be "according to the principles, rules, and usages which belong to courts of equity, and to courts of admiralty respectively, as contradistinguished from courts of common law; except so far as may have been provided for by the act to establish the judicial courts of the United States, subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the Supreme Court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same."

The forms and practice, and indeed the principles of jurisprudence, are very similar in all the courts of admiralty of the world. They are courts of the civil law, of the law of nations, and in England to a certain extent, and in this country still more, although not entirely so in either country,[4] courts of equity. And in this country the forms and whole procedure are simpler, more direct and summary than elsewhere.

In construing the act of 1792, it is to be remembered that sixteen years had elapsed since the independence of the country had been declared, and that, during that time, admiralty jurisdiction had been administered in our courts, and it would follow that if the English mode of practice had been in that time changed by the practice in this country, the latter should prevail.[5]

The power given by the act of 1792 to the Supreme Court of the United States to establish rules, has never been exercised;

[1] The Dawn, Daveis, 121, 133, per *Ware*, J.
[2] 1 U. S. Stats. at Large, 93.
[3] 1 U. S. Stats. at Large, 276.
[4] See ante, p. 649.
[5] Manro *v.* Almeida, 10 Wheat. 473.

but under a subsequent act[1] a body of rules has been framed, which, so far as they are authorized by the statute, are of binding effect. These rules we give in the Appendix,[2] and we shall have frequent occasion to refer to them.

[1] Act of 1842, ch. 188, 5 U. S. Stats. at Large, 518. As this statute is of great importance in determining how far the rules of the supreme court are of binding effect, we cite it here. "The supreme court shall have full power and authority, from time to time, to prescribe, and regulate and alter, the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings, in suits at common law or in admiralty, and in equity pending in the said courts; and also the forms and modes of taking and obtaining evidence, and of obtaining discovery; and generally the forms and modes of proceeding to obtain relief, and the forms and modes of drawing up, entering, and enrolling decrees, and the forms and modes of proceeding before trustees appointed by the court; and generally to regulate the whole practice of the said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein."

[2] These rules are published by order of court in 3 Howard's Reports. Additional rules may be found in the 10th, 13th, 17th, and 21st of Howard.

CHAPTER I.

OF PROCTORS.

THE word Proctor signifies much the same as attorney at common law, and is derived from Procurator.[1] In some districts of this country, proctors attend to the whole management of the cause from the beginning. In others, they conduct the case out of court; while the examination of witnesses in court, the arguments, motions, and other incidents of the trial are attended to by the advocate. The proctor being an officer of the court is held to the utmost good faith.[2] It is his duty to examine a case carefully when it is presented to him, and he ought not, unless the claim is in his apprehension just, or at least doubtful, to bring it before the court, especially in the case of seamen's wages, where generally no available responsibility for costs is incurred by the libellants.[3]

It was formerly the practice in the admiralty, for a proctor in bringing a suit to exhibit a proxy, or a power of attorney, authorizing him to commence and prosecute the suit.[4] At the present day this is not customary, but the proctor is presumed to have the authority to appear until such right is disputed. In England there appears to be much looseness of practice on this point; and in one case a suit was commenced on behalf of the master, owners, and crew of a vessel, and on judgment being given for the respondent, the proctor for the libellant stated that he did not know who his parties were, and the court consequently

[1] In Jackson *v.* Steamboat Magnolia, 20 How. 296, 321, Mr. Justice *Daniel*, in considering the dangers arising from an extension of the admiralty jurisdiction, speaks of "*some apt fomenter of trouble*, metamorphosed and magnified from a country attorney into a proctor." The learned judge was perhaps unfortunate in his acquaintance with proctors; but we cannot accept the above as a definition of this important officer of the courts of admiralty.

[2] See The Earl Grey, 1 Spinks, Adm. 180.

[3] The Frederick, 1 Hagg. Adm. 211, 222.

[4] See Clerke's Praxis, tit. 5, and additions, where it is said that a proctor is constituted either by proxy or *apud acta curiae*.

condemned him in the costs of the suit.[1] And in another case the proctor having caused the production of irrelevant matter by reason of his unfair representations, was obliged to pay the costs.[2]

A proctor may generally be considered sufficiently *dominus litis*, to make an affidavit of any fact upon which to make a motion, especially if the fact be peculiarly within his knowledge.[3]

Proctors, it is said, should always be present when a suit is settled or compromised.[4] But it has been held that a proctor cannot release or compromise a claim without special authority. He is, however, authorized to receive payment, and the amount so paid is a discharge *pro tanto*.[5]

A proctor does not so far stand in the place of his principal that a monition may be served upon him in a different suit from that in which he is retained, although it relates to the same subject-matter.[6]

After a suit is commenced, the respondent has not, as a general rule, the right to settle the case without the knowledge of the proctor of the libellant, and if he does so the settlement may be inquired into by the court.[7] And where a *prochein ami*

[1] The Whilelmine, 1 W. Rob. 335.

[2] The Frederick, 1 Hagg. Adm. 211.

[3] The Brig Harriet, Olcott, Adm. 222. A motion was made that the libellant should file additional security for costs. It was opposed on the ground that the affidavit on which the motion was based was made by the proctor, and not by the claimant. The objection was overruled.

[4] The Frederick, 1 Hagg. Adm. 211, 220.

[5] Bates *v.* Seabury, U. S. D. C., Mass., 21 Law Reporter, 666.

[6] Nichols *v.* Tremlett, U. S. D. C., Mass., 20 Law Reporter, 324.

[7] Rees *v.* Brig Planet, U. S. D. C., Mass., 4 Law Reporter, 353. The libellant in this case was a boy who shipped at St. Johns, N. B., on a certain voyage, but on the vessel's deviating and coming to Boston, demanded his wages and was refused. He then applied to the British consul, who declined to aid him, and then to a proctor of the court. After suit was commenced the master of the vessel sent for the boy, and paid him his wages, but allowed him no costs. The court held that he was clearly entitled to his costs, and the settlement was set aside. See also, McDonald *v.* The Ship Cabot, 1 Newb. Adm. 348. In Purcell *v.* Lincoln, U. S. D. C., Mass., 17 Law Reporter, 217, a suit was brought against the mate of a vessel for a tort. After service of the process, the parties made a settlement, and the libellant gave to the respondent a written discharge of both damage and costs. At the time of the settlement the respondent was confined to his house by sickness, and the libellant represented to him that he had fully paid his proctor. The respondent had not seen or consulted counsel, and there was no evidence that he had received any notice of the claim, or of the intention to institute a suit before the service of process. On all these facts the libel was

fraudulently settled a suit without the knowledge of the proctor for the libellant, the court set it aside.[1] Nor after the decision of the court has the owner a right to pay the wages to the seamen, but the amount should be paid to the proctor, who has a lien on them for his costs.[2]

dismissed. Stress appears to have been laid on the fact that the proctor should have given notice before bringing the suit, as it appeared that the respondent being sick could not escape, and that the settlement was not collusive, and as in an action of tort the damages are indeterminate, it did not appear that the settlement was not a fair one.

[1] The Etna, Ware, 462.

[2] The Araminta, 1 Swabey, Adm. 81.

CHAPTER II.

OF BEGINNING A SUIT IN ADMIRALTY.

SECTION I.

OF THE TIME WHEN A SUIT MAY BE BROUGHT.

In respect to the time in which a suit may be brought, but little need be said. It has been decided that neither the statute of Anne,[1] limiting suits in the English admiralty, nor the statute of limitations of any of our States,[2] is of any force in our admiralty courts. Although it is said that courts of admiralty govern themselves in the maintenance of suits by the analogies of the common-law limitations, and are not inclined to depart from them, unless under very strong circumstances;[3] at the same time, there is an universal maxim, "*vigilantibus non dormientibus subveniunt leges*," and admiralty will not enforce stale demands.[4] And even the most favored lien, that of a seaman for his wages, may be lost by a delay to enforce it.[5] Whether a claim is to be considered stale or not must depend upon the peculiar circumstances of each particular case, and it is difficult to lay down any general rule. It is, however, we think, evident that a party may have a suit *in personam* when he cannot sue *in rem;* because, in this latter case, the rights of a *bonâ fide* purchaser may intervene. If

[1] Willard *v.* Dorr, 3 Mason, 91, 161.

[2] Brown *v.* Jones, 2 Gallis. 477.

[3] The Brig Sarah Ann, 2 Sumner, 206, 212. See also, The Platina, U. S. D. C., Mass., 1858, 21 Law Reporter, 397, 399, per *Sprague*, J.

[4] The Anne, 5 Rob. Adm. 100. The Brig Sarah Ann, 2 Sumner, 206, 212.

[5] See cases in notes, *infra*.

the vessel remains in the hands of the owners who were in possession at the time the debt accrued, an action may be brought after a considerable lapse of time.[1] But if the vessel has been sold to a *bonâ fide* purchaser, the suit should be brought as soon as an opportunity is presented; and if it is not, a delay is fatal.[2]

When the respondent intends to rely on the objection of the staleness of the claim, or any other defence that does not go to the merits, it should be propounded by a formal plea or by a distinct allegation in the answer.[3]

[1] Piehl *v.* Balchen, Olcott, Adm. 24. In the case of The Sloop Canton, U. S. D. C., Mass., 21 Law Reporter, 473, a delay of two years was held not to prevent the enforcement of the lien, where the ownership of the vessel remained unchanged, although, as it would seem from the report of the case, the seamen had the opportunity to libel the vessel at any time within the two years. In The Eastern Star, Ware, 185, the vessel was sold before the wages were earned, and made but one voyage afterwards before she was libelled. It was held that the lien was not lost. See cases ante, Vol. I. p. 433, n. 2; and The Brig Sarah Ann, 2 Sumner, 206.

[2] In Packard *v.* Sloop Louisa, 2 Woodb. and M., 48, 55, a delay of three years, the vessel having been sold, was held to be fatal. If the seamen are present when the sale takes place, and make no objection to it, and do not inform the purchaser of their claims, their lien is gone. Trump *v.* Ship Thomas, Bee, 86; Josline *v.* Scow Bolivar, Olcott, Adm. 474. In the case of The Admiral, U. S. D. C., Mass., 18 Law Reporter, 91, a steamer which plied regularly between St. John's and Boston was libelled for a collision which had taken place twenty months before. There were agents of the vessel damaged in Boston during that time. The vessel in the mean time had been sold to an incorporated company, some of the members of which were the former owners of the vessel. It was held that this fact did not constitute notice to the corporation, and that it was no defence that this suit had been delayed to await the result of another suit pending between the libellants and the former owners of the Admiral. The libel was therefore dismissed. See also Bryant *v.* Brig Lillie Mills, U. S. D. C., Mass., 18 Law Reporter, 494; Leland *v.* The Medora, 2 Woodb. and M. 92, 99; The Utility, Blatchf. & H. Adm. 218; The General Jackson, U. S. D. C., Mass., 17 Law Beporter, 324; Stillman *v.* The Buckeye State, 1 Newb. Adm. 111. In The Ship Mary, 1 Paine, C. C., 180, the seamen were shipped on a voyage from New York to New Orleans, and back to New York. The voyage was broken up at New Orleans, and the seamen were discharged there. The vessel was sold in October, and remained at the same port till the following May, when her owner sent her on a voyage to Liverpool and thence to New York, where she was at once libelled by the seamen. It was held that there being no laches on the part of the seamen, the lien was not lost. In another suit against the Scow Bolivar, mentioned above, it appeared that the libellant was not present at the sale, that the purchaser took the vessel at once out of the State, and that the libellant left his demand with his proctor with directions to have the vessel arrested as soon as she returned to the State. This being done, the lien was held to continue. Shook *v.* Scow Bolivar, Olcott, Adm. 480. See also, Sheppard *v.* Taylor, 5 Pet. 675; Reeder *v.* Steamship George's Creek, U. S. D. C., Maryland, 3 Am. Law Register, 232; Cole *v.* The Atlantic, Crabbe, 440; The Sch. Marion, 1 Story, 68, 72; The Barque Chusan, 2 id. 455.

[3] The Platina, U. S. D. C., Mass., 1858, 21 Law Reporter, 397.

SECTION II.

OF A SUIT FOR SEAMEN'S WAGES.

In suits for seamen's wages, there are some peculiarities of practice which should be noticed. The seamen are by statute,[1] entitled to receive from the master of the vessel to which they belong, one third part of the wages which shall be due at every port where such vessel shall unlade and deliver her cargo before the voyage is ended, unless the contrary be expressly stipulated in the contract; and, as soon as the voyage is ended and the cargo or ballast fully discharged at the last port of delivery, the seamen are entitled to their wages, and if the wages are not paid within ten days thereafter, or if any dispute shall arise between the master and seamen touching the wages,[2] the judge of the district

[1] Act of 1790, ch. 29, s. 6, 1 U. S. Stats. at Large, 133. We have given this statute in the Appendix to Vol. I. p. 507, 510.

[2] It is said by Mr. Dunlap, in his work on Admiralty Practice, p. 100, that this clause relative to a dispute, is not construed by the District Court of Massachusetts, as authorizing, in case of a dispute, a suit in admiralty before the expiration of the ten days, the clause being regarded as either a dead letter, which cannot be carried into effect without violating the spirit of the law, or as merely providing for a dispute respecting the wages, as well as for a neglect of payment, after the expiration of the ten days. If this be the correct construction of the statute, it exposes the seamen to great hardships, for it is usual for the crew, as soon as they are discharged and paid off, which is generally done as soon as they are discharged, to scatter in different directions, so that it is frequently impossible for the seaman with whom the master has had a controversy, to procure any evidence whatever, of the matters about which the controversy exists. To consider the clause a dead letter, is opposed to every principle of construction, and to construe it as giving the right to have the preliminary hearing, in case of a dispute, after the expiration of the ten days, seems to us absurd. To hold that it gives the right of action after the expiration of the ten days, does not help the matter, for the right would exist without the clause, and we must either hold that it has no effect whatever, or else that it means that in case of a dispute concerning the amount of wages, the right to a preliminary hearing accrues at once. This latter view, seems to be adopted by the court of common pleas in Massachusetts, Chaffin's case, Essex, Sept. T. 1825, Dunlap's Adm. Practice, 101, and in the Southern District of New York. See a *dictum* to this effect by *Betts*, J., in The Schooner Eagle, Olcott, Adm. 232, 237. It was held in this case, that where the only defensive allegation was that the wages were not due, because the contract was not fulfilled at the time of action brought, the

where the vessel is, or if his residence be more than three miles from the place where the vessel is, then any judge or justice of the peace may summon the master to appear and show cause why process should not issue against the vessel.[1] And if the master neglects to appear, or appearing, does not show that the wages are paid, or otherwise satisfied or forfeited, and if the matter in dispute is not forthwith settled, the judge shall certify to the clerk of the district, that there is sufficient cause to issue admiralty process, and it shall thereupon issue. And, by a subsequent act, the same power which by virtue of this act is conferred upon any judge or justice of the peace, is given to a United States commissioner.[2]

Immediate admiralty process is permitted, if the vessel shall have left the final port of delivery before payment of the wages, or shall be about to go to sea, before the expiration of the ten days.[3] But unless the case falls within one of the exceptions

contestation of the point did not fall within the provision, which was said to relate "to the proceedings of the seaman after his contract is performed and his right to wages has become perfected." See also, Betts, Adm. Practice, 62.

[1] In Kief *v.* The Steamboat London, 1 Newb. Adm. 6, it was held, that the certificate of the justice of the peace or commissioner under the subsequent statute, must state the residence of the judge of the district, and that it was more than three miles from the place, or that the judge was absent from his place of residence.

[2] Act of 1842, ch. 188, 5 U. S. Stats. at Large, 516. In The Sch. Eagle, Olcott, Adm. 232, the commissioner under this act, granted a certificate of probable cause for process of attachment against the vessel, and the case came before the district court on appeal. *Betts*, J., said: "The competency of the court to entertain an appeal from proceedings before a commissioner, has not been made a question by either party. It is exceedingly doubtful at best, whether the court has any jurisdiction of that kind; but an order to stay proceedings may be made, or the subject may be deemed originally before me; and as all the proofs have been presented and acted upon by both parties, without exception to the appeal, I am disposed to consider and determine the case, the same as if the petition had been presented here in the first instance." It seems, where original shipping articles are proved before a commissioner, and redelivered to the vessel, which thereupon pursues its voyage, that a certified copy of the articles is competent evidence upon the hearing in court. Henry *v.* Curry, Abbott, Adm. 433.

[3] The Cypress, Blatchf. & H. Adm. 83. In The Trial, Blatchf. & H. Adm. 94, it was held, that the seamen are not bound to prove positively that the vessel is about to proceed to sea, but all that is required of them is to show a reasonable ground of belief that the vessel is about to proceed to sea, and this "may be gathered from concomitant circumstances, as well as direct proofs." In both of these cases, the process was by suit in admiralty, and not in the mode pointed out by the statute. It is said, however, in the northern district of New York, to be the custom to require the summons

pointed out, the right of action does not accrue, until ten days after the actual discharge, or after the discharge of cargo might have been and should have been made.[1]

It has been said, that fifteen days would be a proper allowance of time.[2] At all events, the owner would not be permitted to defeat the seamen's claims or suits *in rem*, by a wilful and unnecessary delay in the discharge of cargo. And the Act of 1790 reserves whatever rights the seamen have of proceeding at common law, for their wages. It has been doubted whether the statute did not permit the ten days to run from the end of the voyage, intending them to be the days of discharge;[3] but we think, that this construction cannot be maintained. If the seaman be discharged by the owner or master, then, undoubtedly, the ten days begin to run from the time of the discharge.[4] Nor

and certificate where the vessel is about to proceed to sea, but it is doubted, whether there is any necessity for this, when the vessel has actually gone to sea. 2 Conkling's Adm. 2d ed. 52.

[1] In Hastings *v.* Ship Happy Return, 1 Pet. Adm. 253, Mr. Justice *Peters* doubted whether seamen were obliged to remain and unload the vessel, on account of the general custom which prevails in this country, to have this work performed by stevedores. And in The Mary, Ware, 454, it is said, that the usage of the port must determine whether such an obligation exists. But in The Sch. Eagle, Olcott, Adm. 232, 235, *Betts*, J., said: "Without the aid of an express stipulation, a seaman cannot, accordingly, sue for wages earned on a foreign voyage, until the full completion of the voyage, by the unlading of the cargo or ballast as aforesaid."

[2] In Holmes *v.* Bradshaw, U. S. D. C., Mass., 1822, cited in Abbott on Shipping, 635, note, Mr. Justice *Davis* is reported to have held, that if the crew are retained to unlade the vessel, fifteen working days might be considered a proper time for the discharge of the cargo by analogy to the Collection Act of 1799, and that the ten days then began to run. In Edwards *v.* Ship Susan, 1 Pet. Adm. 165, fifteen days were also allowed; and in Thompson *v.* Ship Philadelphia, 1 Pet. Adm. 210, it appearing that more than fifteen days were necessary, a longer time was allowed, there having been no unnecessary delay. See also, The Martha, Blatchf. & H. Adm. 151; Granon *v.* Hartshorne, Blatchf. & H. Adm. 454.

[3] See Edwards *v.* The Ship Susan, 1 Pet. Adm. 165.

[4] The Mary, Ware, 454; Holmes *v.* Bradshaw, U. S. D. C., Mass., 1822, cited in Abbott on Shipping, 635, note, cited in Dunlap's Adm. Practice, p. 100, as decided Dec. Term, 1823. It was held in this latter case, that the day of discharge was not to be included in the ten days. The most reasonable construction, we think, is put upon these words, "as soon as the voyage is ended, and the cargo or ballast be fully discharged," in the case of The Mary, *supra*. It was shown, that the contract of the seamen might expire as soon as the vessel was moored in safety, or when the cargo was discharged, and the right of the seamen to their wages depended on which of these times was to be taken, the ten days running from one or the other, according to the contract. The libellant must, however, prove the fact of the discharge. In the case of The Sch. Eagle, Olcott, Adm. 232, 236, the libellant contended that he had done

does the statute prohibit the filing of a libel before the ten days have expired, but only the issuing of process.[1] And it has been held, that if the seamen are discharged, the right of action commences at once.[2]

The provisions of the statute apply only to proceedings *in rem*, and not to suits *in personam*, and a seaman may therefore bring an action against the master or owners, as soon as the period of his service is completed.[3]

Although a subject-matter of defence is not set up in the preliminary hearing before the commissioner or magistrate, it may be taken advantage of, when the case comes before the court on its merits.[4]

We shall see, that all seamen having the like cause of complaint against the same ship are required to be joined as complainants.[5] And if several libels are brought by them against the vessel, the court would direct them to be consolidated. In some districts the practice is for some of the seamen to commence an action by the preliminary hearing above mentioned, and when process issues against the ship, for the other seamen to intervene under the thirty-fourth admiralty rule. Before this rule was

this first, by his own affidavit; secondly, by implication or presumption, inasmuch as the crew were not required to unload the cargo, it being done by stevedores, and third, that the master had not denied on oath, the allegations sworn to by the libellant. The court held, that although the affidavit might be sufficient "to authorize supporting proofs in the first instance, or to furnish ground for an order against parties omitting to appear or show cause," yet it was not evidence in a suit in court, especially when contradicted by disinterested witnesses; and it was also held, that the other grounds taken were not sufficient to prove a discharge.

[1] The Mary, Ware, 454. See The Martha, Blatchf. & H. Adm. 151. In Granon v. Hartshorne, Blatchf. & H. Adm. 454, it was held, that where an action is brought prematurely, but becomes perfected before the stipulations and answer of the respondent are filed, and the answer when filed admits a right of action in the libellant, the court need not dismiss the libel but will impose costs on the libellant, if the suit is vindictive or unreasonably prosecuted.

[2] The Cabot, Olcott, Adm. 150. See also, The Cypress, Blatchf. & H. Adm. 83.

[3] Freeman v. Baker, Blatchf. & H. Adm. 372. The rule is stated to be otherwise in the District Court of Massachusetts by Mr. Dunlap, in his work on Admiralty Practice, p. 100; but the doctrine of the text was sustained by that court in January, 1846, in the case of Collins v. Nickerson, cited in Abbott on Shipping, 5th Am. Ed., index, tit. Wages of Seamen, 1000, 7th Ed. 1032. See also, Chaffin's case, court of common pleas, Essex county, Massachusetts, Sept. Term, 1825, Dunlap's Adm. Practice, 101.

[4] The Warrington, Blatchf. & H. Adm. 335, 341.

[5] See post, p. 671, n. 2.

passed, they came in on petition, and the vessel being under arrest, they had the benefit of the attachment, without the preliminary examination.

SECTION III.

OF THE MANNER OF BEGINNING THE SUIT.

In the manner of beginning a civil suit in admiralty, a change has taken place somewhat similar to that by which at common law the original writ was superseded, and the action began in practice at what was once rather a late step in the mesne process. In England, a suit begins in admiralty with a citation of the respondent or defendant, who enters his appearance in court, and gives security, and thereupon the plaintiff offers his libel. With us the libel is the beginning, the earliest proceeding in a suit.

But, before we attempt to describe this instrument or process, we would premise two remarks. One, that, as there is no exact and regular system of pleading in admiralty, acknowledged by all our courts as authoritative, except so far as the same is regulated by the rules of the supreme court, the courts of different districts differ somewhat in their forms. Each court has generally, perhaps always, its own system of rules, which are known to its bar, and however binding upon its members, are not recognized as of positive authority in other districts. The second is, that all our courts of admiralty agree in regarding substance as of more importance than form, in the proceedings which come before it, and therefore any process in admiralty is, in general if not always, sufficient, which distinctly brings the substance of a case, and the actual parties, before a proper court, in such a way as to permit the questions of the case to be investigated, its merits ascertained, and justice done.[1] It is not probable, therefore, that any difference in the rules of practice could lead, often if ever, to more important consequences, than that he who differs from one code of forms by his observance of another, may meet with some delay, and incur the necessity of amendment.

[1] See Jenks *v.* Lewis, Ware, 51.

SECTION IV.

OF THE LIBEL.

The libel (from *libellus*, a little book) is, or contains the statement upon which the libellant, or plaintiff, founds his case. It should properly be brought by the party actually entitled to the relief or aid which the libel prays for,[1] and not in the name of one person, for the benefit of another. It has, however, been held that the agent of absent owners may libel, either in his own name as agent, or in the name of his principals, and that a subsequent power of attorney is a sufficient ratification of what he had done in their behalf.[2]

In cases of seizure, the libel should be in the name of the United States, and the collector should not be joined as libellant.[3] And in case of a capture, the prize proceedings should be in the name of the United States, and not in the name of the captor.[4] Minors sometimes sue in admiralty, without the ntervention of a *prochein ami*, or guardian, and sometimes by one. There seems to be no rule on this point.[5] In some instances, as in some cases of salvage, the libellant sues for himself and for others, and then the libel should state facts to show that, and in what manner, these others are entitled, and who they are, as definitely as may be. If there are many libellants,

[1] Howard *v.* Cobb, U. S. C. C., N. Y., 19 Law Reporter, 377; Mutual Safety Ins. Co. *v.* The Cargo of the Brig George, Olcott, Adm. 89; The Sch. Mary Ann Guest, id. 498. See Fretz *v.* Bull, 12 How. 466. In Gifford *v.* Kollock, U. S. D. C., Mass., *Ware*, J., 19 Law Reporter, 21, it was held that where a minor shipped for a whaling voyage under the direction of his father, who furnished his outfit of clothing, the libel was rightly brought in the father's name.

[2] Houseman *v.* Sch. North Carolina, 15 Pet. 40, 49; McKinlay *v.* Morrish, 21 How. 343.

[3] United States *v.* Three Parcels of Embroidery, U. S. D. C., Mass., *Ware*, J., 19 Law Reporter, 140.

[4] Jecker *v.* Montgomery, 18 How. 110, 124. The suit in this case was in the name of the commander of the capturing vessel. No exception was taken to this mode of proceeding till the case came before the supreme court, and it also appeared that the libel was authorized by the government. It was held that, although the form of action was irregular, yet that it was too late to take advantage of it.

[5] See Dunlap's Adm. Practice, 88.

the case of each should be distinctly articulated, as otherwise, if there be a general decree, and appeals by some of the parties only, there may be needless embarrassment and expense.[1]

SECTION V.

OF JOINDER OF PARTIES.

The act of 1790, relating to seamen, provides that if their wages are not paid, etc., a suit may be brought, "and in such suit all the seamen or mariners (having cause of complaint of the like kind against the same ship or vessel) shall be joined as complainants."[2] Although in other cases parties are not obliged to join in one libel, yet "it is a practice deserving commendation and encouragement in all cases where it can be adopted without complicating too much the proceedings, and thereby prejudicing the rights of the parties."[3] And where several libels by different persons are brought where only one is necessary, the court may order them to be joined, and impose costs upon the libellants.[4] Where the cause of action is a joint contract all the parties to it *must* join; and in the same way the defendants to a joint contract

[1] See Sheppard *v.* Taylor, 5 Pet. 675, 714.

[2] Act of 1790, ch. 29, § 6, 1 U. S. Stats. at Large, 134. See Oliver *v.* Alexander, 6 Pet. 143. In The Sloop Merchant, Abbott, Adm. 1, it was held that a claim for wages and for moneys advanced to the use of a vessel on the part of one libellant, could not be joined in an action *in personam* with a separate claim for wages alone, on the part of another, but could be *in rem*.

[3] Rich *v.* Lambert, 12 How. 347, 353; Fretz *v.* Bull, 12 How. 466. The following citation is from the manuscript case of The Young Mechanic, decided by *Ware*, J., in Maine, in 1855. "It may be stated as a general rule in the admiralty, that where several persons have claims *in rem* against a single thing, whether arising from tort, or contract of a like nature, and all involving one question, all may unite in a single libel for the purpose of having that question tried, although when that is settled there may be special defences applicable to each case. When the general question is decided, the case of each libellant becomes separate and independent, and is litigated on its own merits. But though they may, they are not compelled to unite, and if separate libels are brought, this will have no influence in the hearing on the merits of the case, but will affect only the question of costs, unless satisfactory cause is shown for separate libels."

[4] The Ship Henry Ewbank, 1 Sumner, 400; Rich *v.* Lambert, 12 How. 347, 352.

must be sued jointly. In a case of tort the rule is different. Where the injury is joint, here as before all injured must join. But the defendants, when jointly and severally liable, may be sued severally, and if the trespasses are separate and distinct, several suits should be brought; and if they are joined, the libel should be dismissed for multifariousness, and a misjoinder of parties.[1]

Where the non-joinder of a party as libellant happens for good reason, or, indeed, for any reason not fraudulent or otherwise wrongful, it is not permitted to affect the omitted party, and he may sue afterwards. And parties may be added or struck out by a supplemental libel at any period, if the court think proper.

A part-owner may sustain a petitory suit against a merely fraudulent possessor, without joining the other part-owners, and if they do not appear or object, and the libellant establishes his title, the court will decree the possession of the vessel to him.[2]

SECTION VI.

OF JOINDER OF ACTIONS EX CONTRACTU AND EX DELICTO.

The general rule is often stated by text writers, that actions *ex delicto* may be joined with those *ex contractu* in the same libel. This may be true to a certain extent, and the reason given for it is that no regard is paid to the names or forms of actions, and that it is never made a point of pleading whether the case rests upon contract or tort. The evidence may also be of the same nature in both cases, and thus great expense and delay is saved.[3] The matter is not provided for by the rules of the supreme court, except that it is there enjoined that all libels shall state the nature of the cause; as, for example, that it is a cause civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be. This rule makes

[1] Thomas *v.* Lane, 2 Sumner, 1, 9.

[2] The Friendship, 2 Curtis, 426.

[3] Borden *v.* Hiern, Blatchf. & H. Adm. 293, 297.

one of the reasons above given of no effect, and further adjudication is necessary to determine the question. And the decisions prior to this rule have not been uniform. Where additional wages are given by statute in the case of the discharge of a seaman in a foreign country, it is well settled that these may be recovered in a suit for wages, although they are to a certain ex tent in the nature of damages.[1] Mr. Dunlap, in his work on Admiralty Practice,[2] says: "An action in admiralty has been sustained in the District Court of the United States for the district of Massachusetts, by a mate against a master of a ship for wrongfully dismissing and degrading him from his station, and an article or count for wages was joined in the libel.[3] It is also allowed, but not required, in that court, to join in distinct articles causes of action *ex contractu* and *ex delicto* in the same libel."[4] In 1832, Mr. Justice *Betts* held that a claim against a master and mate for an assault, and a claim against the master for wages earned in the same voyage, might be joined in the same libel.[5] But in 1837, Mr. Justice *Ware* held that an action of damages, as for assault and battery, against the master, could not be joined in the same libel with an action for wages, if it were excepted to.[6] And Mr. Justice *Sprague* has held that a claim for personal damages cannot be included in the same libel with a claim for the fine recoverable under the statute of 1840, ch. 48.[7]

[1] Emerson *v.* Howland, 1 Mason, 45; Orne *v.* Townsend, 4 Mason, 541.

[2] Page 89.

[3] Paty's case.

[4] Ryan's case, Sept. Term, 1831.

[5] Borden *v.* Hiern, Blatchf. & H. Adm. 293.

[6] Pratt *v.* Thomas, Ware, 427. This case was decided on the ground that a claim of damages for a personal wrong is an entirely independent claim, and perfectly unconnected with that for wages. Much stress was also laid upon the point that the master was liable for wages only in his quality as master, and if he had paid them he had his remedy against the owners; whereas the damages recovered against him for a personal wrong were his own proper debt. See also, The Jack Park, 4 Rob. Adm. 308. In Steamboat Orleans *v.* Phœbus, 11 Pet. 175, 182, Mr. Justice *Story* said: "It may be here proper to state that it is very irregular and against the known principles of courts of admiralty to allow in a libel *in rem*, and, *quasi*, for possession, the introduction of any other matters of an entirely different character, such as an account of the vessel's earnings, or the claim of the part-owner for his wages and advances as master."

[7] Knowlton *v.* Boss, U. S. D. C., Mass., 12 Law Reporter, 13. The statute referred to provides that if the master of any vessel shall refuse to allow the seamen to see the consul in any foreign port, "he shall be liable to each and every individual injured thereby, in damages, and shall in addition thereto be liable to pay a fine of one hun-

SECTION VII.

OF JOINDER OF ACTIONS IN REM AND IN PERSONAM.

Prior to the adoption of the admiralty rules of the supreme court in 1845, the question was often discussed as to the propriety of the joinder of actions *in personam* and actions *in rem* in the same libel.[1] It is unnecessary to consider these cases at length as the subject-matter is provided for by the rules referred to. These are in brief as follows: In pilotage and collision cases the libellant may proceed against the ship and master, or against the ship, or against the owner alone, or the master alone *in personam*. In suits for mariners' wages, the ship, freight, and master, or the ship and freight, or the owner or master alone *in personam*, are liable. In case of assaults the suit is *in personam* only. In suits against the ship or freight founded upon a mere maritime hypothecation, either express or implied, by the master for moneys taken up in a foreign port for supplies or repairs or other necessaries, without any claim of marine interest, the suit may be *in rem*, or against the master or owner alone *in personam*. In bottomry bonds the suit is *in rem* against the property hypothecated or its proceeds in whosoever hands it may be found, "unless the master has without authority given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has by his own misconduct or wrong lost or subtracted the property, in which latter cases the suit may be *in personam* against the wrongdoer." In salvage the suit is *in rem* against the property saved or its proceeds, or against the party at whose request and for whose

dred dollars for each and every offence, to be recovered by any person suing therefor in any court of the United States in the district where such delinquent may reside or be found." 5 U. S. Stats. at Large, 397. Mr. Justice *Sprague* doubted whether there was jurisdiction in admiralty to enforce it, and held that if there was, the libellant could not unite "in one libel a claim for personal damages with a claim for a fine which he sues for in a different capacity, that of a common informer."

[1] See Waring *v.* Clark, 5 How. 441; Arthur *v.* Sch. Cassius, 2 Story, 81, 99; The Anne, 1 Mason, 508, 512; Citizens' Bank *v.* Nantucket Steamboat Co., 2 Story, 16.

benefit the salvage service has been performed.[1] In petitory or possessory suits, the process is by an arrest of the ship and by a monition to the adverse party or parties to appear and make answer to the suit. Material-men may proceed, in the case of supplies, repairs, or other necessaries furnished to a foreign ship, or to a ship in a foreign port, against the ship and freight *in rem* or against the master or the owner alone *in personam*. In the case of a domestic ship their right of action for supplies, repairs, or other necessaries, is limited by a late rule to an action *in personam*.

These rules being promulgated in accordance with an act of congress, have all the effect of law, and no suit will lie against an owner *in personam* jointly with a suit *in rem* against the vessel.[2]

It will be noticed that the rule as to material-men provides that the suit shall be against the ship *and* freight. But we do not know of any decision which prevents the party from bringing his action against the ship alone, and in many cases of repairs, there is no freight pending against which to bring the action.

The rules above referred to, make no provisions in respect to contracts of affreightment. To determine whether a joinder of actions is allowed in this case, reference must be had to the

[1] See the 19th Admiralty Rule of the Supreme Court of the United States, and Miller *v.* Kelly, Abbott, Adm. 564. In The Hope, 3 Rob. Adm. 215, an objection to a monition calling on the owner to show cause why salvage was not due, was overruled. See also, The Meg Merrilies, 3 Hagg. Adm. 346; The Rapid, id. 419; The Centurion, Ware, 477. We should suppose that under the term "property saved" might be included the freight of the vessel, because this is as much saved by the salvage service as is the ship or cargo; and in England the action is frequently entered against the ship and freight. The Peace, 1 Swabey, Adm. 85. In Gates *v.* Johnson, U. S. C. C., Ohio, 21 Law Reporter, 279, property found derelict on Lake Erie was brought to Cleveland and deposited with the defendant for safe-keeping. This libel was filed by the salvors, alleging that the defendant had, in violation of their rights, delivered over the property to other parties, and had received a certain sum of money and a bond of indemnity therefor. The sum of money was paid over to the owners of the salving vessel, who were joined as respondents. It was contended that the action would not lie under the 19th rule, but the court held that the admiralty rules were not to be regarded as restrictive, but as enumerative of the more common remedies. But see the cases cited in the next note.

[2] Dean *v.* Bates, 2 Woodb. & M. 87, 92; Ward *v.* The Ogdensburgh, 1 Newb. Adm. 139; The Sloop Merchant, Abbott, Adm. 1. But see Gates *v.* Johnson, 21 Law Reporter, 279, cited in the preceding note.

practice of the courts of the several districts. In New York an action *in rem* and *in personam* against the master has been sustained.[1] We doubt, however, whether such a proceeding would be sustained in Massachusetts.[2]

SECTION VIII.

OF THE ESSENTIAL ELEMENTS OF A LIBEL.

The libel informs the court who the libellant is, and what he claims, and what the facts are which support his claim, and of the persons or things against which the claim is made. We see at once what are the essential elements of a libel. They are seven in number, and each of them should be distinctly set forth, in appropriate language.

I. The name and legal description of the judge, and of the court before which the suit is brought.

II. The name and legal description of the libellant, and any office, function, or relation the libellant may hold, if the right to sustain the action depends upon it, as if he be a foreigner claiming on any particular ground as an heir, or executor, or guardian, in which capacity he might sue at home; or if the libellant be a married woman with separate personal rights.

III. The name and legal description of the person or thing against whom or which the suit is brought.

IV. The nature of the cause, as that it is a cause civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise as the case may be, and if the libel is *in rem*, that the property is within the district, and if *in personam*,

[1] The Zenobia, Abbott, Adm. 48.

[2] See Citizens' Bank *v.* Nantucket Steamboat Co., 2 Story, 16, 57. The action in this case was *in personam* merely, but the language used by Mr. Justice *Story* fully justifies the doubt of the text., In Arthur *v.* Sch. Cassius, 2 Story, 81, 99, the libel was on a charter-party, *in personam* against the master, and *in rem* against the vessel. The master died pending the proceedings, and Mr. Justice *Story* held that the libel must be treated as defunct as to the master, and that it was unnecessary, therefore, to consider whether an action *in rem* and *in personam* could be joined.

the names and occupations and places of residence of the parties.[1]

V. The facts upon which the suit is brought.

VI. That the premises are true, and within the admiralty and maritime jurisdiction of the United States and of the court.

VII. The prayer for the process, which is suited to the case.

VIII. The prayer for the relief or remedy which the libellant seeks by the suit, and which the court is competent to give.

The process prayed for may be a warrant of arrest of the person of the defendant in the nature of a capias; or a warrant of arrest with a clause therein, if the defendant cannot be found, to attach his goods and chattels to the amount sued for; or if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein; or a simple monition in the nature of a summons to appear and answer to the suit. This is the mesne process provided by the 2d Admiralty rule. The relief prayed for may be, that the defendant may be decreed to pay the debt or damage claimed; or that the property be sold for forfeiture, or to pay the demand in the libel, or be decreed to belong to the libellant and to be delivered to him.

How these things should be stated we can better indicate by the forms we give in the Appendix, than in any other way; saying now only that the demand of the libellant should be so clearly stated that the respondent may know, without any doubt, what claims he must repel. The facts should be stated, also, that they may be understood by all interested in knowing them, and the judge be able to see judicially that they bring the case within his jurisdiction and within the law of his court.[2]

It is necessary, however, to say something more of that part of the libel which corresponds to the declaration at common law. It resembles this, so far as it is a statement of the facts which compose the case of the plaintiff; but in other respects it differs. Thus, there are no forms of statement by libel which are definitely appropriated to different actions; and there are no precise rules or precedents which must be followed under peril of certain

[1] 23d Admiralty Rule.

[2] Thus, in Thomas *v.* Lane, 2 Sumner, 1, 10, it is said that "the court cannot judicially know that the tide ebbs and flows in the harbor of Havana."

defeat. The narrative of the libel should be plain, perspicuous, full, giving all the facts which can by any reasonable construction be considered as a part of the case, and expressing all things in clear and accurate language.[1]

In some of the books the "counts" of a libel are spoken of. Thus, Mr. Dunlap says, "It is a common practice to make each count in a libel a distinct article, and to set forth the first allegation in each count as an imprimis averment, and the subsequent allegations in each count as distinct items." But this use of the term might mislead a common-law practitioner. By "counts" is not meant the separate articles in a libel, because it is of the essence of each count in a declaration at common law that it should be good by itself, and that it should be enough to give the plaintiff his case, if all the other counts failed or were stricken out. It is rather of the essence of each article in a libel in a civil case, that it should *not* be thus good and valid of itself; for it should be a component and important part of the whole, not telling the whole story of itself, and yet such that if it were stricken out the whole would be maimed and imperfect. But there are sometimes counts in a libel in admiralty as well as in a declaration at common law, and they are inserted for the same purpose, and to the same end, namely, that if one count fails the other may stand good. Thus, where goods are delivered to the master of a vessel and are destroyed before they are put on board the vessel, and the master gives a bill of lading for them after they are thus destroyed, it would seem to be proper that the libellant should declare in one count, which should consist of several articles, upon the bill of lading; and in another count, which should also consist of several articles, he should declare upon the contract of affreightment, independently of the bill of lading. Because if he declared merely on the bill of lading the answer would be, "The master had no authority to sign the bill till the goods were on board." And if he declared on the contract of affreightment the

[1] The 23d Admiralty Rule prescribes that "the libel shall also propound and articulate in distinct articles the various allegations of facts upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article." In Pettingill *v.* Dinsmore, Davcis, 208, it was held that in a libel for damage, each separate and distinct tort which is relied on, and for which damages are claimed, should be set forth in a distinct allegation.

answer would be that there was a special contract and the action should have been brought on the bill of lading, which was the evidence of the contract.

The word "counts" in the twenty-fourth admiralty rule was probably inserted to meet cases of this kind.

The plaintiff at common law *declares;* the libellant in admiralty *propounds* and *articulates.* It is common in this country for the libellant to say only that he "showeth," to the court so and so. The more accurate method is to say that he "propounds and articulates," or as in some forms, that he "alleges and articulately propounds." What is meant by *articulating*, is the dividing of the statement into its articles, or separate elements, each of which constitutes an article by itself. There can be no uniform and positive rule as to the manner of doing this. The purpose, however, is obvious enough, and will be a sufficient guide. It is that each independent fact, or closely connected sequence of facts, should be stated by itself, in such a way, that each one may be distinctly denied or admitted by the answer, and the proof applicable to each one may be separated, and considered by itself; and as the articles are parts of one continuous narrative, they should follow each other in their proper and natural order. How this may be done in different cases, will be indicated by the forms we give. But it is obvious that no two practitioners would be likely to do this in the same way, and no two cases would permit precisely the same division and arrangement. It is said that a libel may be "simple" or "articulate." And if there is but one fact in the plaintiff's case, or a few facts indissolubly connected, it may be unobjectionable to omit a division into articles. Generally, however, a division will be found useful; and, indeed, the 22d admiralty rule requires statements which, we think, should always be articulated.

It has been remarked that "the properties of a libel are these; namely, that it be round, dilucid, concluding, not obscure, uncertain, nor general, or alternative."[1] So far as we understand these epithets they are applicable, excepting that we have some doubts about the last. We know no good reason, nor sufficient authority for saying that the stating part of a libel shall never

[1] Law's Forms of Eccl. Law, 148.

be, or contain, an alternative.[1] The libellant must state his case as well as he can, and as precisely and specifically as possible, but if it should happen that a material fact, — something, for example, relating to the condition of the ship in a case of salvage, may have been caused in either of two ways; the libellant knows not which, but the defendants do, we know not why he must either omit the fact, or elect one way to state it, taking his chance of its being the right one; or say that it happened in both ways, which would probably be impossible. We should hold, therefore, that he might state the fact precisely as it is in his knowledge; that is, in the alternative.

In many cases of libel *in personam*, the damages are liquidated, or capable of being made precise by evidence; in others, as for personal torts, not; but in either case, and in the last especially, damages should be laid in a definite sum, on account of the law regulating appeals. The amount claimed should not be unreasonably large, nor is the court bound by it, when it is smaller than the justice of the case clearly requires.[2]

Regularly, the libel should be signed by the libellant, or his agent, and by a proctor of the court, and, unless brought in behalf of government, verified by the oath of the libellant. This matter, however, is of course very dependent upon the practice and rules of the several district courts of this country.[3] The

[1] In The Emily & Caroline, 9 Wheat. 381, it was held in an information under the Slave-Trade Act of 1794, that a charge stated in the alternative was good, if each alternative constituted an offence for which the thing was forfeited.

[2] Pratt *v.* Thomas, Ware, 427; The Jonge Bastiaan, 5 Rob. Adm. 322.

[3] In Coffin *v.* Jenkins, 3 Story, 108, 121, Mr. Justice *Story* said: "I observe, too, that there are some irregularities in the present case. The libel is sworn to, but not the answer. The reverse is the usual and proper practice, although there is no objection to the libel being sworn to, if the libellant chooses." This is left to some extent an open question by the admiralty rules of the supreme court. The seventh rule provides merely that "In suits *in personam* no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court upon affidavit or other proper proof showing the propriety thereof." In the Massachusetts district no rule has been passed on this subject since the rules of the supreme court went into operation, but the practice appears to be that the libel is not required to be sworn to unless there is an arrest of person or property. See Dunlap's Adm. 126. The rule appears to be the same in both of the New York districts. In Maine the practice is to require, if not the libel, yet in all cases, the debt or cause of action upon which the libel is filed, to be verified by affidavit. See Hutson *v.* Jordan, Ware, 385.

libellant may require the respondent to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel, at the close or conclusion thereof.[1]

The practice is general in this country, and perhaps universal, to file the libel in the clerk's office, at any time, either of term or vacation, and taking out the proper process thereafter, at once; and until the libel is filed in the clerk's office no process can issue.[2]

But, before speaking of process, it should be remarked that admiralty deems it proper that a request for payment or settlement should be made before an action is brought; and though the court would not probably defeat an action on this ground, unless in extraordinary cases, it would deem it a good reason for throwing the whole expense on the libellant, if there were any reason for supposing that the request might have prevented the litigation.[3]

Where the libel is filed by the government for a breach of the revenue laws, or other offence which is followed by forfeiture, and triable in admiralty, it is called, sometimes, a libel of information, but more properly perhaps, an information, which it is in fact. It differs from the libel in civil cases, in that it begins with stating that the attorney of the United States "gives this honorable court (or the judge aforesaid) to understand and be informed, that, &c.," and then sets forth the place of seizure, whether it be on land, or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and mentions the district within which the property is brought, and where it then is. It should also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require. It should conclude with a prayer of due process to enforce the forfeiture and to give notice to all persons concerned in interest to appear and show cause at the return day of the process why the forfeiture should not be decreed.[4] And

[1] 23d Admiralty Rule.

[2] 1st Admiralty Rule.

[3] See Purcell *v.* Lincoln, U. S. D. C., Mass., 17 Law Reporter, 217.

[4] 22d Admiralty Rule.

as this is in the nature of a criminal proceeding, and therefore all the steps must be critically accurate, the district-attorney sometimes states the fact in many ways, under so many counts of the information, when he is not certain as to the exact facts which will appear in proof. It is not necessary to state any fact which is only matter of defence,[1] but the facts relied on as grounds of forfeiture, should be distinctly and severally articulated, with a general averment that the same are contrary to the form of the statute or statutes of the United States.[2] In other respects the libel of information, the claim and stipulations, and delivery of property, are like those in libels in civil suits, excepting that the district-attorney is never required to stipulate for costs, and such other diversities of practice as arise from any special provisions as to forfeitures or the rules of the courts. On the questions which may arise, the rules of the common law have no force, excepting so far as they are rules also of justice and reason.[3] But it may be prudent, as it is on the whole the safest practice, to follow these rules to some extent, in framing the averments and allegations of the libel; and a libel of information should carefully follow the statute on which it is founded.[4] It is generally sufficient if the offence is described in the words of the law, and so described that if the allegation is true, the case must be within the statute.[5] But if the words of the statute are general, embracing a whole class of individual subjects, but must necessarily be so construed as to embrace only a subdivision of that class, the allegation must conform to the legislative sense and meaning.[6] The offence must also be substantially stated,

[1] The Aurora, 7 Cranch, 382. If the exception is in the positive enactments of the statute it should be negatived, but exceptions which come in by way of proviso, or in subsequent statutes are properly matters of defence for the defendant. United States *v.* Hayward, 2 Gallis. 485, 497.

[2] In The Merino, 9 Wheat. 391, it was held not to be necessary to conclude *contra formam statuti;* but this is now rendered necessary by the 22d Admiralty Rule. Much technical nicety is said to exist in common-law informations relative to a conclusion in the singular or plural, and the rules may be found in Dunlap's Admiralty Practice, p. 118, 119.

[3] The same technical strictness is not required in admiralty as in proceedings at common law. Cross *v.* United States, 1 Gallis. 26, 31; Sch. Hoppet *v.* United States, 7 Cranch, 389; The Samuel, 1 Wheat. 9.

[4] Sch. Betsey, 1 Mason, 354.

[5] The Samuel, 1 Wheat. 9; The Emily, 9 Wheat. 381; The Merino, 9 Wheat. 391.

[6] The Mary Ann, 8 Wheat. 380.

and it is not enough to refer to the provisions of a particular statute.[1] And a charge may be stated in the alternative, if each alternative constitutes an offence for which the thing is forfeited.[2]

The process in admiralty, which follows the libel, is intended, as at common law, to call the defendants into court to answer the plaintiff, or to arrest and hold them personally, or to attach their property and make it responsible for the debt. There is, however, one very important difference between admiralty and common law; it is that admiralty has a proceeding *in rem*, in civil, though not in criminal cases, which is unknown at common law. This undoubtedly arose from the frequent necessity of action in courts of maritime jurisdiction in reference to property, as ships or cargo, when the owners were either unknown or were out of the reach of the court. Whatever be its origin, we have no doubt that it extends to all property or the proceeds of property upon which a maritime claim may be made by the law of admiralty or by a local law, but that the right to proceed *in personam* exists concurrently with the other, and either may be used at the election of the libellant.

[1] The Sch. Hoppet *v.* United States, 7 Cranch, 389.
[2] The Emily, 9 Wheat. 381.

CHAPTER III.

OF MESNE PROCESS.

SECTION I.

OF THE PROCESS OF ARREST OF THE PERSON OF THE DEFENDANT.

THE general power given by the rule we have previously cited (page 677) is limited by the subsequent rule passed at the December Term, 1850,[1] which provides that "imprisonment for debt on process issuing out of the admiralty court is abolished in all cases where, by the laws of the State in which the court is held, imprisonment for debt has been or shall be hereafter abolished upon similar or analogous process issuing from a State court." This rule has, however, been considered as applying only to cases where by the State laws imprisonment for debt is absolutely abolished, and not where it is merely modified and restricted.[2]

If the sum exceeds five hundred dollars, no warrant of arrest

[1] 10 How.

[2] *In re* Freeman, 2 Curtis, C. C. 491. This was a hearing upon a rule against the marshal calling on him to show cause why he had not levied an execution on the body of a debtor. The execution was issued on a decree in admiralty. The marshal set up in defence the United States statutes of 1839, 5 U. S. Stats. at Large, 321, and of 1841, 5 U. S. Stats. at Large, 410, and the act of Massachusetts of 1855, entitled "An Act to abolish imprisonment for debt, and to punish fraudulent debtors." Mr. Justice *Curtis* doubted whether the adoption by congress of prospective legislation by the States was constitutional, but held that congress had adopted merely laws abolishing imprisonment and not laws modifying it, and that the law of Massachusetts fell within this latter class. The case of Hodge *v.* Bemis, U. S. D. C., Northern District of New York, 12 Law Reporter, 470, and the cases of Gardner *v.* Isaacson, Abbott, Adm. 141, and Gaines *v.* Travis, Abbott, Adm. 422, to the same effect, were decided before the additional rule was passed.

of either person or property can issue unless by the special order of the court upon affidavit or other proper proof showing the propriety thereof.[1]

SECTION II.

OF THE PROCESS OF ARREST WITH THE CLAUSE THAT IF THE PARTY CANNOT BE FOUND, HIS GOODS AND CHATTELS MAY BE ATTACHED TO THE AMOUNT SUED FOR.

This form of process applies only to the case where the party cannot be found. It has therefore been deemed necessary in the District of Massachusetts to provide for the case which may arise in consequence of the rule of the supreme court of 1850, relative to the arrest of the person of the defendant, and a rule was passed on the 27th of June, 1855, providing that where the defendant could not be legally arrested the mesne process might be a warrant to attach his goods, etc., as in the supreme cour rule. This rule was made prior to the decision of Mr. Justice *Curtis* above referred to, and was probably made to meet the case of the defendant not being liable to arrest by virtue of the State law. The language of the rule is however sufficiently broad to cover all cases where the defendant cannot be legally arrested.

The question as to the power of the court to grant an attachment of goods when the defendant was out of the jurisdiction, was elaborately considered in an early case as a new question, and the power was asserted by the supreme court, Mr. Justice *Johnson* giving the opinion.[2] It has, however, been held that the 11th section of the Judiciary Act of 1789,[3] which provides that: "No civil suit shall be brought before either of said courts (the district and circuit courts), against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the

[1] 7th Admiralty Rule.
[2] Manro *v.* Almeida, 10 Wheat. 471.
[3] 3 U. S. Stats. at Large, 79.

time of serving the writ," applies equally to the suits in admiralty as to those at common law.[1] But we do not consider this decision to be correct, and have no doubt but that a person who resides out of a certain district, may be sued in admiralty in that district if he has property there which can be there attached.

[1] Wilson *v.* Pierce, U. S. D. C., California, 1852, 15 Law Reporter, 137. The case of Manro *v.* Almeida, 10 Wheat. 473, is explained on the ground that the defendant in that case was an absconding debtor and an inhabitant of the district in which the suit was brought. The decision in the case of Wilson *v.* Pierce, was given by Mr. Justice *Hoffman*, and is of marked ability, and fully discusses the previous decisions. But we do not consider it as sound in principle, and shall briefly consider some of the objections to it. In the first place is a suit in admiralty a civil suit within the meaning of that term in the 11th section? We are clearly of the opinion that it is not. The two sections immediately preceding the one in question provide for the jurisdiction of the district courts in *civil* causes of admiralty and maritime jurisdiction, and in some other peculiar cases. The 11th section, on the contrary, provides in the beginning that the circuit courts shall have original cognizance, concurrent with the State courts, "of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, etc." Concurrent jurisdiction with the district court is also given of crimes and offences cognizable therein, and it also provides that "no person shall be arrested in one district for trial in another in any civil action before a circuit or district court." Then follows the clause which we have cited in the text. It is thus evident, we think, that this clause was confined solely to the subjects embraced in the first part of the section, viz.: "suits of a civil nature at common law or in equity." And this position we think is clearly supported on authority. It is true that the case of Manro *v.* Almeida, is strictly an authority only to the point that an attachment will issue when the party has absconded from the country, and has goods within the jurisdiction of the court.

But that the same rule applied to the case in question was never doubted until the decision of *Hoffman*, J. The point arose in Clarke *v.* New Jersey Steam Nav. Co., 1 Story, 531, where a corporation doing business in New Jersey was sued in the Rhode Island district and their property in that district attached. *Story*, J., who was on the bench when the case of Manro *v.* Almeida was decided, said: "Neither has it been doubted that the process of attachment well lies in an admiralty suit against the property of private persons whose property is found within the district, although their persons may not be found therein, as well to enforce their appearance to the suit, as to apply it in satisfaction of the decree rendered in the suit. Ever since the elaborate examination of this whole subject in the case of Manro *v.* Almeida, this question has been deemed entirely at rest." The facts were the same in New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, and it is somewhat singular, that, if the objection taken by Mr. Justice *Hoffman* is valid, the point should not have been noticed either by court or counsel, or by the three judges who dissented. See also Bouysson *v.* Miller, Bee, Adm. 186; King *v.* Shepherd, 3 Story, 349.

SECTION III.

OF FOREIGN ATTACHMENT.

The second admiralty rule also provides that the warrant of arrest may contain a clause that if the defendant cannot be found, "his credits and effects to the amount sued for in the hands of the garnishees named therein may be attached."

The process of foreign attachment in admiralty is governed by its own rules and principles, and does not depend on, and is not derived from, the custom of London, or the local laws of the different States.[1] Some question has been made whether process of foreign attachment can issue when the defendant is not an inhabitant of the district, but for the reasons already stated we are clearly of the opinion that a suit may be brought in the district court where the property is.[2]

By the thirty-seventh rule of the supreme court, the garnishee is required, in cases of foreign attachment, "to answer on oath or solemn affirmation, as to the debts, credits, or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process *in personam* against him. If he admit any debts, credits, or effects, the same shall be held in his hands liable to answer the exigency of the suit."

It has been held that the warrant of arrest must contain a citation to the garnishee commanding him to appear, and that it is not sufficient to serve upon him a copy of the process, containing the foreign attachment clause without a citation.[3]

[1] Manro *v.* Almeida, 10 Wheat. 473.

[2] See ante, p. 686.

[3] Smith *v.* Miln, Abbott, Adm. 373. The defendant and the garnishee were both defaulted, and on an execution being issued against the "credits and effects" in the hands of the garnishee, he appeared and moved that all proceedings in relation to him be set aside for irregularity. And the court ordered it to be done for the reasons stated in the text. This case was decided in 1848, and in 1858 a somewhat similar question came before the district court in Massachusetts. Shorey *v.* Rennell, Boston Courier,

It will be noticed by the second rule, that the garnishees must be named in the warrant of arrest, and a general order would not be sufficient. And interrogatories to the garnishees, it would seem, may be filed with the libel or afterwards.

June 21, 1858. The garnishee entered an appearance, but gave no stipulation, and put in no answer. After judgment against the defendant, he was called and was defaulted. The proctor for the libellant then filed an affidavit that the garnishee had admitted both before and after the suit was brought, that he owed the principal a certain amount, and moved for execution against the person and property of the garnishee. This was granted, but the execution was afterwards stayed by order of court on motion of the garnishee. The libellant then moved the court for an execution against the garnishee personally, and against his property generally, to the amount of the credits in his hands, as shown by the affidavit. The garnishee then offered his affidavit that he had no goods, effects, or credits of the principal in his hands, and prayed that he might make disclosure under oath, and to answer all interrogatories that might be propounded, and that thereupon he might be discharged. The case was considered at great length and the following conclusions arrived at: that the compulsory process mentioned in the rule was not a process against the trustee to compel him to pay to the creditor his debts to the extent of the credits alleged by the libel to be in the hands of the trustee, but that it was a process to compel him to perform the duty previously prescribed, namely, to answer. The learned judge was also of the opinion that if the garnishee chose to waive his right and submit to a default, it was not imperative upon the libellant to coerce an answer, but if he could upon a default, show to the satisfaction of the court that the garnishee holds debts, effects, or credits, there was no reason why an execution might not issue. It was also said that after such execution, and a refusal by the trustee to pay, he had not the right to make answer that he had not when summoned, any debts, effects, or credits of the defendant in his hands, unless, perhaps, where there was some other cause than existed at the time of the commencement of the suit, as the discharge of the judgment against the principal by other means, or the destruction of the property in the hands of the garnishee without his fault. The circumstances of the case were somewhat peculiar, an affidavit having been put in stating that the proctor of the libellant had agreed that the garnishee need not make answer in court, but that if judgment should be rendered against the principal, the answer might be sent to the proctor, and that the default was obtained without due notice. Under these circumstances the default was taken off, and the garnishee was allowed to answer on condition that his answer might be contested by the libellant, and that he should enter into stipulation with surety to pay whatever sums should be decreed against him. It was also stated on the authority of Clerke's Praxis, tit. 34, that ordinarily the sworn answer of the garnishee would be conclusive, although Mr. Benedict in his Admiralty Practice, § 459, states that the libellant may reply to such an answer and the issue will be tried. Clerke also states that before the answer is sworn to, the libellant may be allowed to show, if he is able, that the garnishee has property of the defendant in his hands. See also, McDonald *v.* Rennel, U. S. D. C., Mass., 21 Law Reporter, 157.

SECTION IV.

OF THE MONITION IN SUITS IN PERSONAM.

The second admiralty rule of the supreme court goes on to provide, that the mesne process may be by a simple monition in the nature of a summons to appear and answer to the suit.

The simple monition should be by service on the respondent, and it is issued only when neither an arrest nor an attachment is desired. In admiralty, we think, it is clear that residence does not give jurisdiction, and either the person or his property must be found in the district. If the person, then there may be an arrest or a monition. If the person cannot be found, then there may be an attachment. But the rules of the supreme court do not provide for an attachment of goods and a monition, unless the suit is *in rem*, and the reason, we think, is this. In suits *in rem*, all the world is bound, and notice should be given, and the rules so provide; but in suits *in personam*, where property is attached, only the interest of the respondent in the property is bound. Notice to the world, therefore, is not necessary, and it would seem that the attachment was intended to operate as a notice to the respondent.

In a case before the supreme court in 1825, the libellant alleged, that the defendant had absconded and fled beyond the jurisdiction of the court, and that no means of redress remained, unless by process of attachment against the goods, chattels, and credits of the respondent. The libel also prayed a personal monition and likewise *viis et modis*, and the court held, that the process was according to the usages of admiralty courts and decreed that it should issue.[1] This process we do not consider to be necessary in cases *in personam* under our new rules, though it was clearly the old admiralty practice.[2] It was the *citatio publica*, or *viis et modis* of the civil law; from which is probably derived the practice in admiralty courts, the ecclesias-

[1] Manro *v.* Almeida, 10 Wheat. 473, 490.
[2] See Clerke's Praxis, tit. 28, 21.

tical courts of England, and the probate courts of this country, of giving notice by posting the citation in conspicuous public places. It is a warrant of the court directed to the marshal, requiring him to give public notice in the manner designated, of the filing of the libel, and the time and place for appearance or trial. It should contain a condensed and very brief statement of the allegations and prayer of the libel. A special monition directs the marshal to give notice to certain persons named therein. The general monition is a notice to all parties interested,—notice to the whole world it is often called, to appear, usually on the first day of the next term of the court, or on the specified return day, and defend the property against the claims of the libellant.

SECTION V.

OF MESNE PROCESS IN SUITS IN REM.

The manner of proceeding in actions *in rem*, is clearly defined by the rules of the supreme court. In ordinary cases, the process, unless otherwise provided by statute, is by a warrant of arrest, and the marshal is thereupon to take the thing arrested into his possession for safe custody, and give public notice thereof and of the time assigned for the return of such process and the hearing of the cause, in such newspaper within the district, as the district court shall order, and if there is no newspaper published therein, then in such other public place as the court shall direct.[1] It is further provided, that in a suit *in rem* against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances, if such tackle, sails, etc., are in the

[1] 9th Admiralty Rule. This mode of giving notice was expressly adopted in the Collection Act of 1799, ch. 22, § 89 (1 U. S. Stats. at Large, 695), which provided that in cases of seizure under the act, the court should "cause fourteen days' notice to be given of such seizure and libel, by causing the substance of such libel, with the order of the court thereon, setting forth the time and place appointed for trial, to be inserted in some newspaper published near the place of seizure, and also, by posting up the same in the most public manner, for the space of fourteen days at or near the place of trial."

possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any there be, why the same should not be delivered over, award that the same be delivered into the custody of the marshal or other proper officer, if upon the hearing, the same is required by law and justice.[1]

If the property at the time the warrant of arrest issues is in the hands of a State officer by virtue of process issuing from a State court, the marshal has no power to take the property, but must delay seizure till after the property has passed from the possession of the officer.[2]

In all suits *in rem*, "where the freight, or other proceeds of property are attached to, or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shown, the court may order the same to be brought into court, and upon failure of the party to comply with the order, may award an attachment or other compulsive process to compel obedience thereto."[3]

SECTION VI.

OF MESNE PROCESS IN REM AND IN PERSONAM.

Regularly, each of the processes given by the second rule is a thing by itself; but it is quite frequent to combine two or more, and sometimes all are contained in one monition. Thus, it may give notice to all the world, and also summon the defendant by name, and contain a warrant or direction to attach the person or the property, directly, or by foreign attachment. But a monition so multifarious as this, would, and must be, very rare. All these things are of course governed in a great degree

[1] 8th Admiralty Rule.
[2] See cases ante, p. 523, n. 1.
[3] 38th Admiralty Rule.

by the rules of court, and in some districts no attachment of person or property can issue without the fiat of the judge. In other districts it issues as a matter of course, either in all cases, or in those of a certain amount or character, or after certain verification of the claim and other facts by the oath of the libellant.

If the suit be both *in rem* and *in personam*, one process, combining the two appropriate processes, may issue, and the marshal executes this process as he would the two if separate; or each process may issue simultaneously, or as each is wanted.[1]

SECTION VII.

OF STIPULATIONS.

The stipulations of admiralty are sometimes called bail; and the forms of certain stipulations are very similar to those of bail bonds; but little, however, is gained by giving them that name, or by applying to them any of the principles of common-law bail. They are usually without seal, the admiralty court in England not taking jurisdiction of deeds or other specialties. In this country no such distinction is made, and a seal neither limits the jurisdiction nor materially affects the jurisprudence of our courts of admiralty.

These enrolments are the stipulations of the civil law, on and by which the party stipulating enters into certain engagements,

[1] We have seen that by the rules of the supreme court, suits *in rem* and *in personam* may be joined in many cases, and it would seem necessary, when this is done, to issue a monition to the defendants as well as to arrest the property, for, if the owner should appear and defend the suit *in rem*, this would not render him liable *in personam* beyond the value of the property arrested. In petitory and possessory suits, the 20th Admiralty Rule provides that the process shall be by an arrest of the ship and by a monition to the adverse party or parties to appear and make answer to the suit. In Blanchard *v.* Ship Cavalier, U. S. D. C., New York, *Betts*, J., it was held that under this rule, when a vessel is arrested, notice must be given specifically to the adverse party, and that it is not enough to arrest the vessel and publish a general notice to all concerned.

and certain others guarantee the due execution of these engagements as his sureties, or, as they are sometimes called, *fide-jussores*, which is their name in the civil law.[1] These stipulations are of many kinds; they differ principally, however, accordingly as the action is *in personam* or *in rem*, and the forms in blank are usually provided by the clerk.

In all suits *in personam*, where a simple warrant of arrest issues and is executed, it is provided by the third admiralty rule, that the marshal may take bail, with sufficient sureties, from the party arrested, by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered there in the court, to which the process is returnable, or in any appellate court. And upon such bond or stipulation summary process of execution may and shall be issued against the principal and sureties, by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.[2]

[1] See Lane *v.* Townsend, Ware, 286, for a learned exposition of the subject of bail bonds, and stipulations by the civil and by the common law. In Clerke's Praxis, additions to title 4, Hall's ed. p. 12, it is said: "Securities, or cautions, as they are termed by civilians, are of three sorts:

"1. *Judicatum Solvi;* by which the party is bound absolutely to pay such sum as may be adjudged by the court.

"2. *De Judicio Sisti;* by which he was bound to appear from time to time during the pendency of the cause to abide the sentence and also to pay a tenth part of the sum in dispute if he should be defeated.

"3. *De Rato;* by which he engaged to ratify and confirm the acts of his proctor.

"With respect to the manner in which these cautions were taken, they were:—

"1. *Cautio fide jussoria;* by sureties.

"2. *Pignoratitia;* by deposit.

"3. *Juratoria;* by oath.

"4. *Nudi Promissoria;* by bare promise."

Where the stipulation is merely in *judicio sisti*, the bail may surrender the debtor at any time before a decree against them. Lane *v.* Townsend, Ware, 286.

[2] See Gardner *v.* Isaacson, Abbott, Adm. 141. In a case in Massachusetts, entitled, In the Matter of the Bail of Snow, 2 Curtis, C. C. 485, the condition of the bail bond was merely to appear and answer, and abide the final decree, and nothing was said about paying the damages. Judgment had been obtained against the defendant, and on application of the plaintiff, the court being satisfied that the defendant was beyond the seas, ordered a monition to issue to the bail to show cause why he should not pay the judgment, and why process should not issue against him. It was contended that there was no breach of the bond until an execution should have been issued and returned *non est inventus*, but *Curtis*, J., said: "I am of opinion that it is not necessary

By an additional rule, passed December term, 1850,[1] it is ordered that in all suits *in personam* where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the State where an arrest is made, upon similar or analogous process issuing from the State courts.

And in a suit *in personam* where property is attached, it is provided by the fourth rule that the attachment may be dissolved by the defendant giving a bond or stipulation, with sureties. The conditions of the bond are the same as are provided by the first rule, except as to that which relates to the appearance of the defendant, which is omitted.

The fifth rule provides that bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court. The thirty-fifth rule is much to the same effect, with some differences. It provides that "stipulations in admiralty and maritime suits may be taken in open court, or by the proper judge at chambers, or under his order, by any commissioner of the court who is a standing commissioner of the court, and is now by law authorized to take affidavits of bail, and also depositions in civil causes pending in the courts of the United States." The former rule has been supposed, by Mr. Conkling, to be useless, but it may well be that the latter rule was intended only to provide for stipulations for costs, and not for bonds or stipulations. The thirty-fourth rule provides that intervenors shall be required to give stipulations for costs, and the thirty-fifth rule may have been intended to apply merely to such stipulations. We are not able, however, to express so definite an opinion on this point as we could wish, and further adjudication is also necessary to

to take out an execution against the principal to charge such bail in the admiralty. It is in conformity with the practice of the high court of admiralty in England to proceed summarily against the bail, in a case where the principal has gone out of the kingdom, by issuing a monition to the bail to show cause why execution should not go against them, without citing the principal, or issuing any process against him. It is upon this practice that the rule No. 3, for the admiralty practice of the district court, was framed." In New York, the practice is not to obtain a monition, but to issue an execution at once against the defendant and his stipulators. Gaines *v.* Travis, Abbott, Adm. 422; Holmes *v.* Dodge, id. 60.

[1] 10 How.

determine whether, under the thirty-fifth rule, the words "or under his order," were intended to prevent a commissioner from acting except under the order of the judge, or whether they have reference to a special commissioner.

By the sixth rule, it is provided that "in all suits *in personam* where bail is taken, the court may, upon motion, for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor; and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid, if either of the sureties shall become insolvent pending the suit, new sureties may be required, by the order of the court, to be given, upon motion and due proof thereof." [1]

If the suit be *in rem*, the stipulation is given for the purpose of obtaining possession of the property, and not for that of liberating the person; and the eleventh admiralty rule provides that in such a case the vessel "may be delivered to the claimant, upon a due appraisement to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, as aforesaid; and if the claimant shall decline any such application, then the court may, in its discretion, upon the application of either party upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court, or otherwise disposed of as it may be deemed most for the benefit of all concerned." This rule is, to some extent, of less importance than formerly, on account of the passage of the act of 1847.[2] The title of this is, "An act for the reduction of the costs and expenses of proceedings in admiralty against ships and vessels." The language of the act is, however, general, and would embrace any other property as well as vessels. It is as follows: "That in any case brought in the courts of the United States, exercising jurisdiction in admiralty, where a warrant of arrest or other process *in rem* shall be issued, it shall be the duty of the marshal to stay the execution of such process, or to

[1] We should however suppose, notwithstanding this rule is confined to the case of bail actually given, and to the insolvency of the sureties, that the court, by virtue of its general admiralty power, would have the power to order new sureties to be given if the old ones were insufficient, though not actually insolvent.

[2] Ch. 55, 9 U. S. Stats. at Large, 181.

discharge the property arrested if the same has been levied, on receiving from the claimant of the same a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge of the said court, or in his absence by the collector of the port, conditioned to abide and answer the decree of the court in such cause; and such bond or stipulation shall be returned to the said court, and judgment on the same, both against the principal and sureties, may be recovered at the time of rendering the decree in the original cause."

If the stipulation is for a sum certain, the surety cannot be compelled to pay more than that sum, although the stipulation is conditioned to pay such sum as shall be awarded by the final decree.[1]

It has been held in England that where the owners of a vessel are only liable to the extent of the value of the ship and freight, the bail are only liable to the same extent, although the action may have been entered and the bail given in a larger sum;[2] and probably the same rule would obtain in this country, in similar cases, for the stipulation is regarded as a substitute for the thing itself, and the stipulators are liable for no more and no less than the thing itself, if it had remained in the custody of the court.[3] And the valuation in the stipulation cannot be increased in the appellate court.[4] It has also been held that if a claimant receives the vessel upon a stipulation to pay into court its appraised value with interest and costs, he cannot insist on allowances because he has discharged liens for seamen's wages; and if much delay has intervened, of which he has had the benefit, he must pay interest.[5] If it is necessary for the purposes of justice to take possession of property which has once been delivered up, on a stipulation, the proper process against a person who is in

[1] Brown *v.* Burrows, 2 Blatchf. C. C. 340.

[2] The Duchesse De Brabant, 1 Swabey, Adm. 264.

[3] In The Palmyra, 12 Wheat. 1, the case had been dismissed in the supreme court on the ground that there had been no final decree in the circuit court, but as it afterwards appeared that this arose from a mistake of the clerk, and that a final decree had actually been made, the court ordered the cause to be reinstated, although it was objected that they had no authority to do so after a dismissal, because it might operate to the prejudice of the stipulators to whom the vessel had been delivered.

[4] Houseman *v.* Schooner North Carolina, 15 Pet. 40, 51.

[5] The Virgin, 8 Pet. 538.

possession, if he is not a party to the stipulation, is a monition, and not an execution in the first instance.[1]

SECTION VIII.

OF STIPULATIONS FOR COSTS.

By the ancient rules of admiralty, the plaintiff was required to find *fidejussores* for the prosecution of the suit, for the payment of the defendant's costs if the plaintiff should fail in the cause, and for the production of the plaintiff personally as often as he might be called.[2] In England this seems now to be confined to the case of non-residents, and it is not then enforced when the defendant has arrested sufficient property of the plaintiff in another suit.[3] In this country various rules have been enacted by the different district courts on this subject. By the old seventh rule of the first circuit, on motion of the defendant, the court would oblige the plaintiff, except where the suit was for the United States, on pain of dismissing the libel, to give a stipulation with sureties to appear from time to time and abide all orders, etc., and to pay all costs. But this rule was not applied where the libellant was too poor to furnish a stipulation, and he was then admitted to give the juratory caution; but even this was not considered essential unless it was demanded by the defendant.[4]

In the Southern District of New York, it was provided by rule forty-four that no process *in rem* should issue, or appearance or answer be received, or third party be permitted to intervene and claim, except on the part of the United States, unless a stipulation to pay costs was first entered into.[5] Seamen suing for wages for services on board American vessels,[6] and salvors

[1] The Gran Para, 10 Wheat. 497.

[2] Clerke's Praxis, *tit.* 14.

[3] See The Sophie, 1 W. Rob. 326; The Volant, id. 383.

[4] Polydore *v.* Prince, Ware, 402.

[5] The 44th Rule was formerly numbered 14.

[6] 45th Rule. This rule has been held not to apply to an agreement made by a seaman with the master outside of the shipping articles, and the seaman in such a case must file a stipulation for costs. The Great Britain, Olcott, Adm. 1.

bringing property into port are not required to give such security in the first instance, but after the arrest of the property the court may order it to be given for adequate cause shown. By a new rule established in 1849, in suits *in personam* for wages under fifty dollars, the usual stipulation is required, except in certain specified cases. In the Northern District of New York the rule is confined to cases where the libellant is a non-resident, and does not apply to suits for wages or for salvage when the salvors have come into port in possession of the property libelled; and the court has a discretionary power to require a stipulation where the libellant is a resident.

This subject is not provided for by the rules of the supreme court.

The practice not to call on seamen for security is only from a presumption of their inability, and is not applied where this presumption disappears.[1]

In respect to the liability of the defendant to give bail, the twenty-fifth rule of the supreme court provides "that in all cases of libels *in personam*, the court may in its discretion, upon the appearance of the defendant, where no bail has been taken and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation with sureties in such sum as the court shall direct, to pay all costs and expenses, which shall be awarded against him in the suit upon the final adjudication thereof, or by any interlocutory order in the process of the suit."[2] In suits *in rem* the claimant, upon putting in his

[1] Wheatley *v.* Hotchkiss, U. S. D. C., Mass., 1854, 16 Law Reporter, 692, 694. The libel in this case was dismissed without costs, and on the libellant claiming an appeal, the respondent moved that he be required to give security for costs. It appeared that the respondent had recently paid the libellant over four hundred dollars in a suit for a tort. Mr. Justice *Sprague* said "that the practice of exempting seamen from giving security for costs, was on account of their presumed inability. Any other person may sue in the admiralty without giving security, upon proof of inability, and a seaman may be required to give security, if his ability is proved. This libellant has had one hearing without giving security, and now upon claiming an appeal, there is evidence tending to show his ability to give security for costs, and he must stipulate with surety for such costs as the appellate court may decree, unless he prove himself unable to do so by satisfactory affidavits."

[2] This rule, it will be perceived, is limited by its terms to the case of an action *in personam*, where no bail has been taken and no attachment of property has been made, and the defendant has appeared. It would seem only to apply to the case where the party has appeared under the command of a monition, and this is the view taken of it by Mr.

claim is obliged by the twenty-sixth rule to file a stipulation with sureties in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or upon an appeal, by the appellate court. The thirty-fourth rule makes the same provisions where a party intervenes in a case.

If any obligor to an admiralty stipulation die *pendente lite*, the court may proceed against the survivor, or at the option of the plaintiffs against the representatives of the deceased also, and in one case, the vessel having been forfeited to the United States, the court said, that if the surety would bring the money into court, it would, with the assent of the district-attorney, allow him to proceed against the principals in the bond and their representatives, in the name of the United States, to enforce his indemnity.[1]

By these stipulations, the sureties agree and consent that executions may issue against them, their heirs, executors and administrators, goods, and chattels, for whatever sum may be decreed if the stipulation be forfeited. Whether process founded thereon would issue against the lands of the principal stipulator, or his sureties, is not positively determined by the authorities.[2] And if the principal, in a suit which does not

Justice *Betts*, who accordingly held that where a party is arrested he is not entitled to be discharged on giving bail to appear and pay all costs, and to perform and abide all orders and decrees of the court in the cause, and to deliver himself personally for commitment in execution thereof, but that he must give a bond to satisfy the decree made against him. Gardner *v.* Isaacson, Abbott, Adm. 141. Mr. Justice *Conkling*, however, supposes that the rule applies to the case where the defendent is arrested, and cannot get bonds to satisfy the decree, and that he is then entitled to be liberated on giving a bond for the payment of costs.

[1] The Ship Octavia, 1 Mason, 149. This case, it will be perceived, was decided before the new rules were passed, but we presume the law is the same now.

[2] It is said in Clerke's Praxis, by Hall, p. 13, that "the securities in admiralty, though in the nature of recognizance, do not authorize the court to proceed against lands." And this, we presume, is the rule in England. See Marriott's Form. 273. By the old third rule of the first circuit, the sureties were obliged to stipulate that the execution might run against their lands. Nothing is said on this subject in the new rules of the supreme court, but clearly the lands of the defendant cannot be attached under the second rule, nor seized on execution against the defendant under the twenty-first rule. We should not suppose that stipulators would be liable for more than the principal. In a case recently published in New York, it however seems to be assumed that the lands of the stipulators are liable. The suit was *in personam*, and on judgment being obtained, an execution issued against the real estate of the stipulator. The only questions made were whether a judgment obtained in the southern district of

survive, dies, the sureties should, regularly, suggest the death to the court, and procure an order for their discharge.

SECTION IX.

OF CONTUMACY AND DEFAULT.

The libellant must appear and prosecute his suit according to the course and orders of the court, and if he does not, he is decreed in contumacy and default, and on application of the defendant, the court may pronounce the suit to be deserted, and the same may then be dismissed with costs.[1]

So if the defendant omits or refuses to make due answer to the libel upon the return day of the process, or other day assigned by the court, the court pronounces him to be in contumacy and default, and the libel is taken *pro confesso* against him, and the court proceeds to hear the cause *ex parte* and adjudge therein as to law and justice pertains.[2] The power of the court to set aside such a default we shall consider hereafter.

These rules, we presume, apply as well to suits *in rem* as to those *in personam*.

New York, was a lien on the land in any county of the district, and also whether it was necessary to file the transcript of the judgment in the office of the clerk of the county in which the lands were situated, and whether the statutes of the State applied. The court answered the first question in the affirmative, and the last two in the negative. Cropsey *v.* Crandall, 2 Blatchf. C. C. 341.

[1] 39th Admiralty Rule.

[2] 29th Admiralty Rule.

CHAPTER IV.

OF THE CLAIM AND OTHER PROCEEDINGS PRIOR TO THE ANSWER.

SECTION I.

OF THE CLAIMANT.

In any suit *in rem*, the property is taken at once into custody, and is considered as in possession of the court from the beginning of the action. The owner of the property, either being personally notified, or taking notice from the general monition, may appear for his interest in the property attached, and put in his claim and answer. These should regularly be separate, but in practice in this country, they are frequently and perhaps usually united in one document, which is then called "The claim and answer of A. B." etc. Of the answer to the libel, we will speak presently. The claim must be verified by the oath of the claimant;[1] he may be the owner of the property, or his general agent, or one specially authorized; or the master of the vessel,[2] or in case of a foreign ship, the consul of the nation to which it

[1] The 26th Admiralty Rule provides, that "In suits *in rem* the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant, by whom, or on whose behalf the claim is made, is the true and *bonâ fide* owner thereof."

[2] See The Hoop, 1 Rob. Adm. 129; and cases *infra*. The right of an agent to make a claim is recognized by the twenty-sixth Admiralty Rule, which provides that "Where the claim is put in by an agent or consignee, he shall also make oath, that he is duly authorized thereto by the owner, or if the property be at the time of the arrest in the possession of the master of a ship, that he is the lawful bailee thereof for the owner." We presume that this last clause means that if the master claims the vessel for the owner, he shall make oath, etc.

belongs.[1] This he can do, however, only as commercial agent, for if the suit or claim, grows out of a contested national right, only a diplomatic minister may act. Nor has the consul any power to do more than intervene and protect the interest of the absent. He may carry on the defence, and do every thing that is necessary for this purpose, giving security for costs, authorizing proctors, and the like; and for all such acts as these, done in good faith, and not in themselves obviously unreasonable, the principal owner, or the property, would be bound. But the consul would not be permitted to receive the property, or the funds, from the custody of the court, without especial authority from the owner.[2]

The right of an agent to claim property, is strictly limited to the case of the absence of the principal. Thus, one part-owner of goods, if both are within the jurisdiction of the court, cannot claim the property for himself and the other owner.[3] Nor can the master of a vessel make the claim, if the owner is present.[4]

Strictly speaking, no person can claim a vessel or other property, unless he has a proprietary interest in the thing claimed, or acts for such person.[5] One who appears because he has a lien or other interest or claim upon the property, is called an intervenor. And both classes are specially provided for, by the rules of the

[1] The London Packet, 1 Mason, 14, 21; The Bello Corrunes, 6 Wheat. 152; The Antelope, 10 Wheat. 66. And in the case of The Ship Adolph, 1 Curtis, C. C. 87, it was held that a foreign consul had authority to petition the court to order the marshal to pay into the registry proceeds of a sale of property libelled for salvage, in which citizens or subjects of his country were interested, they being absent and having no other legal representative in this country.

[2] See cases in note above.

[3] Sch. Lively, 1 Gallis. 315.

[4] Sch. Sally, 1 Gallis. 401. In the case of The Sch. Adeline, 9 Cranch, 244, the court said: "Where the principal is without the country, or resides at a great distance from the court, the admission of a claim and test affidavit by his agent, is the common course of the admiralty. But where the principal is within a reasonable distance, something more than a formal affidavit by his agent is expected. At least, the suppletory oath of the principal as to the facts should be tendered." The objection in this case was not taken till the case came before the supreme court, and the court held that it was too late. See also, Spear *v.* Place, 11 How. 522.

[5] This distinction is also recognized by the twenty-sixth and the thirty-fourth admiralty rules. The former of which provides for the case of a claimant, and the latter, for a third person intervening.

supreme court. It is true, that intervenors have been called claimants,[1] but this language is inaccurate, the rights of the parties being entirely distinct.[2] An intervenor does not claim the thing in controversy, but only asserts an interest in it. He cannot, therefore, ordinarily be admitted to dispute the cause of action of the libellant, but merely asserts his own claim, and generally, that it is superior to that of the libellant. It has, however, been held, that an attaching creditor may intervene and contest the suit, the owner not defending.[3] The thirty-fourth admiralty rule has also been construed to allow third parties to come in, not merely as intervenors, but as parties subrogated to the rights of the original claimant by operation of law, as in the case of the death of a party, after the case came before the court. And an underwriter, who, after the case came before the circuit court on appeal, accepted an abandonment made before the suit was brought, was allowed to intervene as *dominus litis*.[4]

If the party claiming the goods cannot make good his title to them, the court will not give them up, if the libellant fails in his suit, but will retain them for the actual owner,[5] and it is said to be usual to retain them for a year and a day.[6]

After a case has gone before the supreme court on appeal, a new claim cannot be presented in that court, but it may be presented to the circuit court, when the cause is remanded.[7]

[1] Thus, in The St. Jago de Cuba, 9 Wheat. 409, the court speak of a claim filed by seamen for their wages.

[2] In United States *v.* 422 Casks of Wine, 1 Pet. 547, 549, a full and accurate definition of a claimant and his duties is given.

[3] The Mary Anne, Ware, 104. The vessel in this case had been attached by a creditor in the State court, and was afterwards seized by the government for a forfeiture, and the creditor was allowed to defend the suit.

[4] The Brig Ann C. Pratt, 1 Curtis, C. C. 340. *Curtis*, J., said: "The thirty-fourth rule seems well enough adapted to such cases. Unless this construction be put upon it, I perceive no provision even for the death of a party, after an appeal to this court; and as this court does not possess power to remit an admiralty cause to the district court, and there is no rule expressly providing for a supplemental libel to be filed here, some rule to prevent the abatement of suits is needful, and I shall hold this thirty-fourth rule to be applicable to all such cases." Underwriters, however, cannot intervene until they have accepted the abandonment. The Ship Packet, 3 Mason, 255; The Ship Henry Ewbank, 1 Sumner, 400; The Sch. Boston, 1 Sumner, 328, 332; The Bee, Ware, 332, 335.

[5] The Boat Eliza, 2 Gallis. 4, 11; United States *v.* 422 Casks of Wine, 1 Pet. 547, 550.

[6] Stratton *v.* Jarvis, 8 Pet. 4.

[7] The Societé, 9 Cranch, 209.

SECTION II.

OF STIPULATIONS, AND THE DELIVERY OF THE PROPERTY.

Before any claim or answer can be allowed or be heard, there must be a sufficient stipulation for the costs.[1] Such a stipulation is not, however, essential to render a claimant liable for fees for services rendered by the clerk of the court, but he is liable for these from his relation to the suit as *dominus litis*.[2]

If there be separate and distinct interests, there must be separate claims and answers, and separate stipulations.[3] But if one or more parties in interest, refuse to make answer or claim or enter into stipulation, or are unable to do so, their contumacy or inability will not be permitted to injure the other parties in interest, who may proceed by themselves.[4]

If the property is attached, either in a suit *in rem* or *in personam*, as the property of a certain person, and another party, a stranger to the suit, claims the property as his own, in which case at common law, he would take it by replevin, he would in admiralty put in his claim (not however answering the libel), setting forth his title, and on giving a stipulation with sufficient sureties, the property would be delivered to him.

In almost all cases in which property in custody of the court of admiralty is claimed by any party, it will be delivered to him on proper stipulation. But this, though seldom refused, is not a matter of course, but is in the discretion of the court.

In the case of a bottomry bond, the ship of which the possession is demanded by the obligee, is the very security agreed upon, and usually the only one, for the debt of the obligor, and for this reason it is said, that admiralty will not deliver the ship to the obligor, even on stipulation with sureties, without the consent

[1] See ante, p. 697.

[2] In the Matter of Stover, 1 Curtis, C. C. 201.

[3] Stratton *v.* Jarvis, 8 Pet. 4.

[4] The Mary, 9 Cranch, 126.

of the libellant.[1] So it is said, in respect to a suit for salvage,[2] but the eleventh admiralty rule makes no such distinctions. We have no belief that any court would refuse this delivery, merely for want of consent, for, if the case was a contested one, and the obligee and libellant chose to be perverse and stubborn the ship might lie in the harbor, useless and decaying, perhaps, while commissions were going to the other side of the world to obtain evidence.

If the property in possession of the court is perishable, and is not taken out by stipulation, the court will order it, on motion of either party, and cause shown, to be examined and inspected, and a report made, and if necessary, will decree a sale of the property with proper precautions to avoid unnecessary loss. And the funds arising from the sale go into the treasury of the court, subject to decree, in the same manner in which the property itself might have been.[3] It may also be added in this connection, that if a party appears and files a claim, he thereby waives all objection to the regularity of the process.[4]

Some other questions of stipulations by the respondent, we treated of in a former section, in order to present the statutory law on the subject of stipulations in a great measure, together.[5]

SECTION III.

OF THE POWER OF THE COURT TO ORDER DOCUMENTS TO BE PRODUCED BEFORE ISSUE IS JOINED.

The practice of the court of chancery was formerly to require the defendant, if he wished to inspect documents in the possession of the plaintiff, to file a cross bill and pray for a discovery.[6]

[1] Dunlap's Adm. Practice, 176.

[2] The Ship Nathaniel Hooper, 3 Sumner, 542, 562. Mr. Justice *Story* said the proper course, if the property was perishable or might sustain injury from the delay, would be to have a sale of it authorized by the court.

[3] 10th Admiralty Rule.

[4] The Merino, 9 Wheat. 391.

[5] See ante, p. 692–697.

[6] Spragg *v.* Corner, 2 Cox, 109.

In one case, however, the court ordered an instrument to be produced for inspection;[1] but this case is generally considered as of but little authority and has not been followed.[2] The rule at common law is that the defendant is entitled to inspect any instrument in the possession of the plaintiff, which is the subject of the action, and on which the plaintiff bases his claim.[3]

The power of the court of admiralty in such cases has not until recently, been invoked, and no definite rule is to be found in the text-books or in the earlier reports. In 1857, the question arose whether in a suit on a contract, which contract was partly in writing and partly oral, a letter in the libellant's custody, and which, it was alleged, was essential to the full understanding of the contract, should be ordered to be produced on motion of the defendant. The court held that if the whole contract had been in writing, and the letter in question contained the whole contract, the defendant would be entitled to have it produced. So, if the whole contract being in writing, the letter was a part of the writing, if it appeared that the rest of the contract was either produced or within the control of the parties, and that there was no dispute as to what writings existed and were to be produced. But as the contract was to be proved partly by written and partly by parol evidence the court refused to require the libellant to produce it.[4]

[1] Princess of Wales *v.* Earl of Liverpool, 1 Swanst. 114. In this case an affidavit was made that a note of hand which was in suit was believed not to be genuine, and it was necessary, in order that the answer might fully meet the case, that inspection of the note should be granted.

[2] See Shepherd *v.* Morris, 1 Beav. 175; Milligan *v.* Mitchell, 6 Simons, 186; Penfold *v.* Nunn, 5 Simons, 405; Jones *v.* Lewis, 4 Simons, 324, overruling the same case, 2 Simons and S. 242.

[3] See 3 Daniell's Ch. Practice, 2070.

[4] The Steamer Le Voyageur de la Mer, U. S. D. C., Mass., 1857, 20 Law Reporter, 331. The reasons given for the decision are, that if the paper was produced the defendants would obtain an advantage, as they would learn the extent of the knowledge or ignorance of the other parties as to the proofs of the contract, and without first answering as to their best knowledge and belief, could frame their answers to meet the disclosures on one particular point.

CHAPTER V.

OF THE ANSWER.

THE answer should correspond with the libel. The caption should state the court, the judge, the parties, and the kind of case, with legal accuracy and in appropriate language. It should then proceed to exhibit the defence, answering the libel, article by article, in the same order as numbered in the libel, and should answer in like manner each interrogatory propounded at the close of the libel.[1] What it admits, should be admitted unreservedly, if possible, and not by way of hypothesis; that is, not, if so and so, then so and so.[2] But where this is made necessary by the nature of the case, as where certain facts are stated, of which the defendant cannot know whether they are true or false, but which he believes to be false, and has a perfect defence against them, if true, we can see no sufficient reason why he may not state his belief, and then his defence; and why, if he supposes that they may be true, he may not state this, and say, if true then his defence is so and so. Such we should believe to be within the allowed practice of admiralty, for good cause shown, because there are here no rules like those of special pleading. Both the libel and the answer, and every other document in the case must be as precise and definite as the party can make it, consistently

[1] 27th Admiralty Rule. In The Sch. Boston, 1 Sumner, 328, 330, *Story*, J., said: "The answer should accordingly reply to each article by a clear and exact admission or denial, or defence to the matter of it."

[2] Treadwell *v.* Joseph, 1 Sumner, 390. The charge was that the respondent did with force and violence, without rightful cause or justification, order the libellant to scrape down the masts of the ship for a long space of time, to wit, fourteen hours, the wind then blowing heavily. The answer was "that the scraping of the masts of a ship is a necessary duty," etc., "and that *if* the libellant was employed in that manner, it was a part of the ship's duty, which the libellant was bound to perform." It was held that a conditional answer of this nature was improper; that a party setting up the excuse or justification of any act must admit the existence of it. It was held also that the answer did not meet the gravamen of the charge, because it was only the duty of the crew to scrape the masts at proper times and seasons, and in a reasonable manner.

with the actual facts of the case, or his actual knowledge or his means of knowledge of these facts. But further than this we do not know that any rule or practice would carry the courts.

Every fact relied on in defence should be set forth with all due form of time, place, and circumstances.[1]

The defendant may rest upon mere denial of the plaintiff's allegations, or upon new matter of his own; and upon matters which he asserts to be positively true, or upon those which he declares to be true, according to his best knowledge. And every answer should be verified by the oath or solemn affirmation of the defendant,[2] except where the sum or value in dispute does not exceed fifty dollars exclusive of costs, unless the district court shall be of opinion that this is rendered necessary for the purposes of justice owing to peculiar circumstances in the case before the court.[3] The defendant may also in his answer object to respond to any allegation or interrogatory contained in the libel which will expose him to any prosecution or punishment for a crime, or for any penalty or any forfeiture of his property for any penal offence.[4] And the defendant may in his answer require the personal answer of the libellant upon oath or solemn affirmation to any interrogatories which he may propound at the close of the answer, touching any matters charged in the libel, or touching any matter of defence set up in the answer, subject to the like exception as to matters which shall expose the libellant to any prosecution or punishment or forfeiture as provided in the 31st rule. And if the libellant does not duly answer these interrogatories, the court may adjudge him to be

[1] Orne *v.* Townsend, 4 Mason, 541. In Pettingill *v.* Dinsmore, Daveis, 208, it was held that if the master desired to show, in defence to an action for wages, that the seaman was habitually careless, disobedient, or negligent, as a justification or mitigation of damages, he should set it forth in his answer.

[2] 27th Admiralty Rule. In an early case in this country it was held that where the libel required the answer to be under oath, it required two witnesses to contradict the statements of the answer. Teasdale *v.* Sloop Rambler, Bee, 9. But the more correct view is, that this doctrine has no standing in admiralty. Sherwood *v.* Hall, 3 Sumner, 127; Hutson *v.* Jordan, Ware, 385; Andrews *v.* Wall, 3 How. 568, 572. And now that the answer is required to be under oath by an express rule of court, the oath of course can have no effect as evidence. Eads *v.* The Steamboat H. D. Bacon, 1 Newb. Adm. 274. It is also said in this last case that the answer under oath is of no more effect although it is responsive to interrogatories propounded.

[3] Additional Admiralty Rule, passed Dec. Term, 1850, 10 How.

[4] 31st Admiralty Rule.

in default, and dismiss the libel, or may compel his answer by attachment, or take the subject-matter of the interrogatory *pro confesso* in favor of the defendant, as it may in its discretion deem most fit to promote public justice.[1]

If either the libellant or the defendant is out of the country, or unable from sickness or other casualty to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may in its discretion, in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.[2] The answer may be verified by the oath of the agent or proctor of the respondent, who must also make oath that he has authority from the owner of the property or was the lawful bailee thereof at the time of the arrest.

There is nothing in admiralty which answers precisely, in form, or in its technicalities to the plea in abatement,[3] or demurrer,[4] or exceptions of common law courts. But so far as these are of substance they exist and must exist in the practice of all courts. Exceptions to the libel are often filed under that name, and are provided for, as to the time and manner of filing, notice, answer, or confession, etc., by the rules of some of our courts.[5] They go usually to the jurisdiction of the court, or to the insufficiency of the libel, either in point of form or of substance. But, with or without using the word "except" or "exception," the defendant in his answer may object to the libel that it is frivolous, unintelligible, impertinent, or otherwise improper, and if his objection be grounded in fact and reason, the court will

[1] 32d Admiralty Rule.

[2] 33d Admiralty Rule.

[3] Defences which do not go to the merits of the case should, however, properly be made by a plea. They may be set up in the answer, but only by a distinct allegation. The Platina, U. S. D. C., Mass., 1858, 21 Law Reporter, 397.

[4] But in Manro *v.* Almeida, 10 Wheat. 473, the case came before the court on a demurrer to a libel. Nothing, however, is said of a demurrer in the new Admiralty rules.

[5] The 36th rule of the supreme court provides that "Exception may be taken to any libel, allegation, or answer for surplusage, irrelevancy, impertinence, or scandal, and, if upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged at the cost and expense of the party in whose libel or answer the same is found."

order a further libel, or decree against the libellant generally, or make such other order or disposition of the case as justice may require. So, the defendant may say in his answer, that the court has no jurisdiction of the case,[1] or that it has been judged and determined elsewhere,[2] by a court having jurisdiction; or settled by compromise carried into effect, or that the court, or the parties are wrongly named, or the action wrongly brought. All of these, and more, would be included in pleas of abatement; and being

[1] In Teasdale *v.* Sloop Rambler, Bee, Adm. 9, it was held that a plea to the jurisdiction must be by the party himself, and under oath. At the present day very little formality is necessary to bring the question of jurisdiction before the court. No provision is made for it in the admiralty rules, and no uniformity of practice exists. The doctrine of the supreme court has always been that consent cannot give jurisdiction, and if the want of jurisdiction is brought before the court in any manner, either by the respondent, or is perceived by the court itself, the suit will be dismissed. Thus in Cutler *v.* Rae, 7 How. 729, the case came before the supreme court on an appeal on its merits, and the respondent made no objection to the jurisdiction, but the court ordered the question of jurisdiction to be argued, and afterwards dismissed the libel. See also Gruner *v.* The United States, 11 How. 163; Ballance *v.* Forsyth, 21 How. 389. In Wilson *v.* Graham, 4 Wash. C. C. 53, there was a plea to the jurisdiction and a demurrer to the plea. In Vandewater *v.* Mills, 19 How. 82, the objection to the jurisdiction was taken by an exception to the libel. In Jackson *v.* Steamboat Magnolia, 20 How. 296, the question of jurisdiction was raised on an agreed statement of facts. The objection is also very often taken in the answer. Dean *v.* Angus, Bee, 369; Bogart *v.* The John Jay, 17 How. 399; The Genesee Chief *v.* Fitzhugh, 12 How. 443; Waring *v.* Clarke, 5 How. 441. And it is sometimes presented by a motion to dismiss the libel. The Bee, Ware, 332. The Supreme Court of the United States may also issue writs of prohibition to the district courts when the latter are proceeding as courts of admiralty. Act of 1789, c. 20, § 13, 1 U. S. Stats. at Large, 81. It is somewhat remarkable that this power has been exercised by the court in but one reported case. United States *v.* Peters, 3 Dall. 121.

In England the usual way of bringing up the question has been by a protest to the jurisdiction, but it has been doubted whether this is the proper way of bringing the question before the court. The Alexander, 1 W. Rob. 288, 293.

[2] In Taber *v.* Jenny, U. S. D. C., Mass., 19 Law Reporter, 27, the answer set up an award of referees as a bar to the libel, but as it appeared that one of the referees had prejudged the cause, and the umpire had not heard the parties but had made up his mind from statements made by the referees, the award was set aside. And when a plea of *res adjudicata* is made, the record of the former judgment should show that the very question, the precise title of which is the subject of litigation in the new action, was involved and decided in the former action, and not merely that it might have been. The Vincennes, U. S. D. C., Mass., *Ware*, J., 21 Law Reporter, 616. In The Clarence, 1 Spinks, Adm. 206, a verdict obtained at common law was pleaded but overruled. The case was then taken to the Privy Council, and at the hearing, Lord Justice Kt. *Bruce* expressed his surprise that the matter could be again litigated, and intimated that if the judgment in the common-law court had been pleaded, it would have been a bar to the action.

stated in the answer, the court will, if they are not denied, decree for defendant, or order an amendment of the libel, or take some other proper course. And if the answer admits all the facts stated in the libel, and then denies their sufficiency in law to make out the libellant's case, this, which is in substance a demurrer, would be judged of like any other answer, upon its substantial merits. It should be added, however, that while a want of jurisdiction arising from the subject-matter of the action, is fatal if brought to the notice of the court at any stage,[1] yet, if it be merely a personal exemption, the court are strongly disposed to regard an appearance and answer as a waiver of this objection.[2]

The pendency of another action for the same cause, in a foreign court is not a good plea in abatement, even at common law, and a State court is foreign in respect to a United States court for this purpose.[3] The plea should also show that the other court has jurisdiction of the suit, and it should be verified by affidavit, if any matter of fact is contained in it.[4]

If the defendant makes an error, and even a material one, in his answer, he may correct it by a supplemental answer; or by an amendment; and the adverse party will not be permitted to profit by it, if the error has been made innocently, and not as a trap.

When the libellant relies on new matter in avoidance of the defence set up in the answer, he should not put it in issue by a replication as formerly, but by an amended libel.[5]

If a plaintiff or defendant die, and the cause of action sur-

[1] See Cutler *v.* Rae, 7 How. 729, cited in the preceding note. The objection must, however, be taken before the case is remanded by the supreme court. Washington Bridge Co. *v.* Stewart, 3 How. 413; Whyte *v.* Gibbes, 20 How. 541.

[2] Thus a defective summons is cured by the appearance of the party. Prankard *v.* Deacle, 1 Hagg. Eccl. 169, 185. The admiralty court of one country is not bound, as we have seen, to exercise jurisdiction in suits between foreigners, but as it may do so, an objection to the jurisdiction should be made before entering an appearance, and answering to the merits of the case. The Bee, Ware, 332. See also, ante, p. 705, n. 4.

[3] White *v.* Whitman, 1 Curtis, C. C. 494. See also, Wadleigh *v.* Veazie, 3 Sumner, 165; Lyman *v.* Brown, 2 Curtis, C. C, 559.

[4] White *v.* Whitman, 1 Curtis, C. C. 494.

[5] 52d Admiralty Rule. See also Taber *v.* Jenny, U. S. D. C., Mass., 19 Law Reporter, 27.

vive, his executor or administrator may appear, and will be treated as the actual party.[1]

It is said that there must be no double pleading in admiralty, and from what we have said, it is obvious that there need be none. But if there are distinct counts in the libel, properly stated, each of them should receive each its adequate and appropriate answer.

[1] The 31st section of the Act of Sept. 24, 1789, 1 U. S. Stats. at Large, 90, provides "that where any suit shall be depending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party who was plaintiff, petitioner, or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment," etc. We presume that this statute was intended to apply to suits in admiralty as well as to actions at law or in equity. This subject is not mentioned directly in the admiralty rules of the supreme court, but Mr. Justice *Curtis* supposes that it is covered by the 34th Rule, which provides for the intervention of a third party. The Brig Ann C. Pratt, 1 Curtis, C. C. 340, 343. But this rule appears to be limited by its terms to the case of a third person intervening for his own interest, and we should not suppose it was meant to apply to the case of a person suing in a representative character.

CHAPTER VI.

OF AMENDMENTS.

AMENDMENTS in matters of form may be made at any time, on motion to the court, as of course. And new counts may be filed, and amendments in matters of substance may be made upon motion at any time before the final decree, upon such terms as the court shall impose. "And where any defect of form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libellant."[1] Under this rule it has been held that if the amount

[1] 24th Admiralty Rule. This rule begins, "In all informations and libels in causes of admiralty and maritime jurisdiction, amendments," etc. This is the only rule relative to amendments, and we should suppose it would apply to amendments of answers as well as of libels. It may be well to state the former practice of the courts in respect to amendments. In the supreme court it has been held that the court will not allow an amendment which sets up a new subject of controversy. In the superior court of a county in Florida, sitting as an admiralty court, a claim had been made for salvage, and by a process *in rem*, seventy-two bales of cotton were attached, and condemned. The claimant appealed, but the libellant did not. In the next highest court, the court of appeals, the libellant had leave to amend by claiming fifty more bales. On appeal to the supreme court it was held that the claim for the fifty bales being a new subject of controversy, the court of appeals had no authority to allow the amendment. Houseman *v.* Schooner North Carolina, 15 Pet. 40. In The Schooner Harmony, 1 Gallis. 123, an amendment by inserting a new substantive offence was disallowed, on the sole ground that the statute of limitations had run against it. In The Marianna Flora, 11 Wheat. 1, an amendment as to a matter of substance was held to be correctly allowed in the circuit court on appeal from the district court. In The Sch. Boston, 1 Sumner, 328, 331, *Story*, J., said: "It is the well-known usage of admiralty courts, even after an appeal, in fit cases, in their discretion, to allow either party to file new allegations and proofs; *non allegata allegare, et non probata probare.*" Facts, material to the defence having come to the knowledge of the claimants after an appeal, they were allowed to file a supplementary answer. See also, The Edward, 1 Wheat. 261; Schooner Adeline, 9 Cranch, 244. In Coffin *v.* Jenkins, 3 Story, 108, decided the year before the new admiralty rules were adopted, the respondent moved in the circuit court for leave to file an amendment to his answer setting up a new point of defence, which had not been taken in the district court, namely: that in the whale fisheries the master was not liable for lays, and that an action could be brought only against the owners or other agents in possession

demanded in the inferior court is not sufficient to justify an appeal, the libellant cannot amend by adding a claim for interest.[1]

The application of the above rule to the amendment of an answer in the circuit court on appeal from the district, has been considered at length by a distinguished jurist, and we state his conclusions in his own words in our note.[2] The form of the

of the proceeds of the voyage. The amendment was not allowed, on the ground that the facts on which it rested were not new or newly discovered, and *Story*, J., said: "The rule, *in appellatione à sententiâ definitivâ licet non allegata allegare et non probata probare*, has many limitations, and requires many." In Schooner Anne *v.* The United States, 7 Cranch, 570, it was held that a libel could be amended after reversal for the want of substantial averments.

[1] Udall *v.* Steamship Ohio, 17 How. 17.

[2] Lamb *v.* Parkman, U. S. C. C., Mass., per *Curtis*, J., 21 Law Reporter, 589. After stating that the 24th admiralty rule applied to the circuit as well as to the district court, and that it was left to the sound discretion of the court in every case, or regulated by rules of practice, as to what amendments should be allowed, under what circumstances, and supported by what proofs they should be applied for, and in what form incorporated into the record, the learned judge said: "In this court there are no such written rules; but there are courses of decision in similar or analogous cases, which afford proper guides to the exercise of the discretion of the court. Some of these will be adverted to.

"The first is, that leave is given to amend a sworn answer in respect to any matter of substance, with great caution; and where the amendment consists in a denial of a fact previously admitted, or in the allegation of new facts amounting to a new defence, not exhibited to the court of the first instance, I must require the grounds for the amendment, and the reasons why it has become necessary, and why its necessity was not earlier known, to be clearly and satisfactorily shown by affidavit.

"Second. Each of the proposed changes in the answer should be exhibited separately, with apt references to the original answer, so that it can be seen how the original answer will be affected by each; and so that each, when allowed, can be incorporated into the original answer, when taken into a new draft as an amended answer.

"Third. The respondent will not be allowed to require formal proof of written documents, the authenticity of which was admitted by the original answer, without an affidavit denying the signatures, and explaining satisfactorily his former admission; nor to require the production of original papers, copies whereof were admitted by the original answer to *be correct*, and were used on the trial in the district court, without showing that such originals are in the possession or under the control of the libellant, and can be produced without causing delay, and that the production of such originals is material.

"Fourth. When an amendment seeks to withdraw an admission of a matter of fact, upon the ground that it was made because the respondent mistook the law, the court will permit it with great caution, and only under extraordinary circumstances, if ever. (See Daniels, Ch. Pr. 913.)

"Fifth. The court will not allow a defendant to recast his entire answer, after he has discovered from the opinion of the district court, how it may successfully be done, so as to shift the burden of proof, or obtain, by skilful pleading, other legal advantages. (Calloway *v.* Dobson, 1 Brock. C. C. 122.) Amendments in sworn answers in the

action cannot be allowed to be changed by an amendment. Thus, if a possessory suit is brought according to the rule of the supreme court, by a suit *in rem* and a monition to the parties, the libellant cannot amend so as to proceed *in personam* against the respondent for damages for a non-performance of contract.[1]

It has been held that an appellee, who was the libellant in the district court, may in the circuit court amend his libel so as to claim damages above the costs for the vexatious delay caused by the appeal.[2] We are unable, however, to see upon what principle of law this case proceeded.

Motions, petitions for adding or subtracting parties, for distribution, sale, or any incidental purposes, are received by the court in admiralty with great freedom, nor is it held any objection to an amendment, that the rights of sureties may be affected; for they take upon themselves all the liabilities of their principals.[3]

The rules of the court seldom interfere with proceedings of this nature, and it may be said that they are always admitted where substantial justice requires them. Thus, a salvor, not joining with the rest, nor knowing his rights or claims, has been permitted to file a petition after the case had been decided, and a decree of distribution rendered, and distribution made; and he was then ordered a share out of the balance of proceeds which, not having been paid over to the claimant, remained in the custody of the court.[4] It should, however, be remarked, that if a case in

appellate court should introduce new substantive facts, previously unknown, or correct substantial mistakes in matters of fact, and cannot be allowed on account of any mere defect of skill in drafting the original answer, in consequence of which the respondent's case was not presented on the record in the best possible manner, or so as to secure to him all possible legal advantages."

[1] Kynoch *v.* The S. C. Ives, 1 Newb. Adm. 205.

[2] Weaver *v.* Thomson, 1 Wallace, Jr. 343.

[3] The Schooner Harmony, 1 Gallis. 123, 125.

[4] Ryan *v.* Ship Cato, Bee, 241. The petitioner in this case found the vessel a derelict, took her in tow for two days, and finally anchored her nearly in sight of Charleston lighthouse, and then went to Charleston for assistance. When he returned he found that the vessel had gone adrift, and was afterwards picked up by other persons. The petition also set forth that the petitioner had no knowledge that any suit had been commenced, no monition having issued, until the decree was made. It appeared that the agents of the underwriters and owners appeared and suggested that no monition was necessary, and none was issued, and that the property was sold at Edisto Island with their consent, instead of having been brought to Charleston. Under these circumstances the court decreed two hundred dollars from the owners' share of the proceeds, after the salvage had been decreed.

admiralty be taken by appeal to the supreme court, no new claim, nor libel, nor substantial amendment, can be admitted there, because the question it may raise, cannot be examined and determined there as it might have been below. If it be a case of forfeiture, and the libel is so defective that a decree cannot be pronounced, the supreme court will send the case back to the court below, that it may be there amended. And generally, if an amendment be offered in the supreme court, the cause will be remanded to the circuit court, that the amendment may there be made.[1]

In regard to the manner and time of filing any of the documents we have spoken of, or of taking them from the court, etc., we need say but little, because these things are regulated by the rules of each court. These rules generally provide for a reasonable and sufficient time, so that while parties on the one hand may have proper notice and opportunity, on the other, there may be no unreasonable or prejudicial delay. Ordinarily, the libel and all succeeding papers, are filed in the clerk's office,[2] but the act of congress relating to forfeiture, makes it perhaps necessary that a libel of information should be filed in court.[3]

[1] Brig Caroline *v.* The United States, 7 Cranch, 496; The Divina Pastora, 4 Wheat. 52; The Mary Ann, 8 Wheat. 380.

[2] The 1st Admiralty Rule prescribes that no mesne process shall issue from the district court in any cause of admiralty and maritime jurisdiction, until the libel or libel of information shall be filed in the clerk's office.

[3] Mr. Dunlap, in his treatise on Admiralty Practice, p. 130, is of the opinion that in an admiralty case in behalf of the United States, to enforce a forfeiture, it would be hazardous to adopt any other course, because the Act of 1799, ch. 22, § 89, 1 U. S. Stats. at Large, 695, declares that it shall be "libelled and prosecuted" in the "proper court having cognizance thereof." But we should not infer from this that it was absolutely essential that the libel should be filed in open court.

CHAPTER VII.

OF SET-OFFS AND CROSS LIBELS.

If the respondent has a claim against the libellant, he can in many cases avail himself of it in his answer, as a set-off. The admiralty has no jurisdiction of an independent set-off,[1] and those usually allowed are where advances have been made upon the credit of the particular debt or demand for which the plaintiff sues, or which operate by way of diminished compensation for maritime services on account of imperfect performance, misconduct, or negligence, or as a restitution in value for damages sustained in consequence of gross violations of the contract.[2] A loss arising from the gross neglect of a mariner may be set off in answer to a demand for wages.[3] If an action is brought for freight, it is held that damage done to the goods may be set off.[4] So freight is to be deducted, if the suit is for damage done to the goods.[5]

A set-off, founded on a contract, express or implied, is no defence to a libel in a cause of damage. But in a suit by a parent for the wrongful abduction of his minor son, where the damage is substantially the loss of service, the court is not absolutely precluded from considering, in determining the amount of damage, the advances of clothing and other necessaries furnished the minor during the time.[6]

[1] Willard *v.* Dorr, 3 Mason, 161, 171. In The Lady Campbell, 2 Hagg. Adm. 14, n., a suit was brought by a purser for his wages. The owners of the vessel claimed to set off a sum due for the passage of the purser's wife, but the court refused to allow it.

[2] Willard *v.* Dorr, 3 Mason, 161, 171. See also, The Mentor, 4 Mason, 84.

[3] The New Phœnix, 2 Hagg. Adm. 420.

[4] Bearse *v.* Ropes, U. S. D. C., Mass., 19 Law Reporter, 548; Snow *v.* Carruth, same court, 19 Law Reporter, 198; Thatcher *v.* McCulloh, Olcott, Adm. 365; Bradstreet *v.* Heron, Abbott, Adm. 209; Zerega *v.* Poppe, id. 397.

[5] See cases ante, Vol. I. p. 151, n. 2.

[6] The Platina, U. S. D. C., Mass., 1858, 21 Law Reporter, 397.

It would seem that if the set-off is more than the amount sued for, the respondent cannot afterwards bring a suit for the balance,[1] and on this account a cross libel is often filed, in which case the court, if there is no inexcusable delay in bringing the cross suit, will delay the execution in the original case till the other is heard.[2]

It has been said that where a cross libel is filed, process should be taken out and served in the usual way, and that an agreement of counsel that the answer of the respondents in the original suit should operate as a cross libel, is irregular, and ought not to receive countenance.[3]

[1] Bearse *v.* Ropes, U. S. D. C., Mass., 19 Law Reporter, 548; Nichols *v.* Tremlett, U. S. D. C., Mass., 20 Law Reporter, 324, 329.

[2] Nichols *v.* Tremlett, U. S. D. C., Mass., 20 Law Reporter, 324, 327.

[3] Ward *v.* Chamberlain, 21 How. 572.

CHAPTER VIII.

OF THE TRIAL AND ITS INCIDENTS.

SECTION I.

OF THE TRIAL GENERALLY.

THERE is seldom much delay in bringing any suit in admiralty to a trial, beyond that which the actual circumstances of the case, as the distance of witnesses or other facts of like kind, may require. There must be, by law, four stated terms of the courts in the year, at places, and times prescribed by law, and there may be others at such other times and places as the respective judges shall think proper.[1] In our largest cities these courts are held very frequently, sometimes every week, and much of the business of the court is transacted by the judge, out of court, or at a special court held for the purpose, as the convenience of the parties, and the nature of the case may require.

SECTION II.

OF EVIDENCE IN ADMIRALTY.

The trial very frequently proceeds upon the libel and answer. The answer, though under oath, does not require two witnesses to contradict it, as we have seen.[2] And we should say without

[1] Act of 1789, ch. 20, § 3, 1 U. S. Stats. at Large, 74.

[2] See ante, p. 708, n. 2.

any doubt that although the answers of the respondent to the interrogatories contained in the libel are evidence in the case,[1] yet they are not of more effect than any other evidence, but should be received with caution, as coming from an interested party. It has been held that if the facts alleged in the libel are not denied in the answer, they are not, therefore, to be taken as confessed.[2] But as the 27th admiralty rule provides that the answer shall be full and explicit, we should suppose that the contrary would now be considered as the more correct rule. A claim, though under oath, is not evidence.[3]

It may be doubtful whether a libel filed by a party to another suit can be given in evidence against him as his confession. But if he brought the suit as trustee and recovered, the *cestuis que trust* may put the whole record in evidence to show the recovery and the title on which it rested.[4] In the admiralty, state laws of evidence are not applied, and interested witnesses are excluded except in cases of necessity.[5] And in a suit *in rem* against the vessel to recover the value of the goods, the master is considered as an interested witness, but a release from some of the part-owners renders him competent.[6] Declarations of the master concerning the contract of affreightment are admissible in a suit against the owners, though they are not strictly part of the *res gestæ*.[7]

In England, it has long been the custom for the judge in cases of collision at the hearing of the cause to be assisted by two or more masters of the Trinity House, who give their opinion which vessel is in fault. This opinion, though not binding on the court, is usually followed. In this country we have no such practice, generally;[8] but it was at one time customary in the

[1] The David Pratt, Ware, 495.

[2] Clarke *v.* Brig Dodge Healy, 4 Wash. C. C. 651, 655. It was contended that the rule was the other way, but Mr. Justice *Washington* said: "This is a doctrine as novel as it is untenable."

[3] Sch. Thomas & Henry, 1 Brock. C. C. 367.

[4] Church *v.* Shelton, 2 Curtis, C. C. 271.

[5] The Independence, 2 Curtis, C. C. 350.

[6] The Peytona, 2 Curtis, C. C. 21.

[7] The Enterprise, 2 Curtis, C. C. 317.

[8] It would seem that a practice similar to the English, obtains in Pennsylvania, for Mr. Justice *Kane*, in the case of The Red Bank Co. *v.* The John W. Gandy, 7 Am. Law Register, 606, remarks: "The nautical gentlemen who did me the kindness to

Massachusetts district to submit the evidence to nautical men, and to take their opinion upon the facts in the case.[1] This practice was considered, however, as open to some objection, and in 1855 it was declared to be improper, and the more correct mode pointed out of taking the opinions of the experts upon a hypothetical case.[2] And in England the opinions of nautical men in respect to a case of salvage have been rejected by the court.[3]

Affidavits are seldom admitted as proof. The court will not receive by an affidavit of a party any facts offered in bar to the action,[4] nor will it on an affidavit of any one, decide questions relative to charges of a criminal character,[5] nor receive it to contradict,[6] or to fill out a deposition of the same person, nor in explanation and justification of the conduct of a party, which has appeared in evidence and has been commented on by counsel.[7]

Probably the strict rule and the original practice permitted no oral testimony in admiralty; now, both in England[8] and in this country, it is constantly received, particularly in those cases, as actions for seamen's wages and the like, which require to be disposed of in the shortest time and at the least expense. But in all cases of magnitude it is better and more usual to take the evidence in writing, if this can be done, especially if there is any probability of an appeal of the case. Where the evidence

hear the evidence with me, are of opinion," etc. We are, however, aware of no other district where this course is pursued.

[1] In Peele *v.* Merchants' Ins. Co., 3 Mason, 27, 36, Mr. Justice *Story* said: "As to the question of the sufficiency of the repairs, that is so dependent upon practical skill in nautical affairs, that if the cause were to turn upon it, I should, according to the known course of the admiralty, refer it to experts to report upon the whole evidence, what in their judgment is the true posture of the case in this respect."

[2] The Clement, 2 Curtis, C. C. 363. This case was taken by appeal to the supreme court, and new depositions were taken, containing the opinions of the experts in the manner pointed out. But as the court were equally divided in opinion on the facts of the case, the case has never been reported, and we are unable to state whether the mode indicated received the sanction of the supreme court.

[3] The No, 1 Spinks, Adm. 184.

[4] The Lord Hobart, 2 Dods. 100.

[5] The Apollo, 1 Hagg. Adm. 306, 315.

[6] The Georgiana, 1 Dods. 397, 399.

[7] Wood *v.* Goodlake, 2 Curteis, Eccl. 82, 97.

[8] 3 & 4 Vict. ch. 65, §§ 7, and 8.

is oral, the clerk of the court[1] in some districts, or the judge[2] trying the case, will take it down in writing, on motion or request, that it may be used on appeal; and the notes of evidence thus taken go up with the case, and are used by either party; and either party may introduce more evidence, by the same witnesses, or by others.

The taking of testimony in writing or by depositions, is regulated, in part by the statutes of the United States, and in part by the rules of the courts. The question has been much discussed by Mr. Conkling of the proper mode of taking testimony in the circuit court, and his opinion is that it should be oral, except in cases where a deposition *de bene esse* is allowed, or where it is taken under a *dedimus potestatem* "to prevent a failure or delay of justice." The act of 1803, ch. 40,[3] provided that upon an appeal from the circuit court to the supreme, "a transcript of the libel, bill, answer, depositions, and all other proceedings of what kind soever in the cause, shall be transmitted to the said supreme court." Congress had previously authorized the taking of evidence in equity suits in the circuit court by deposition, at the request of either party, except in those States in which testimony in chancery is not taken by deposition.[4] In 1833, Mr. Justice *Story* said: "I beg here to repeat, what was stated at the bar at the time, but seems not to have been generally understood in practice, that since the act of the 3d of March, 1803, ch. 93 (ch. 40), in admiralty causes, as well as in equity causes, all the evidence originally taken in the circuit court, in cases capable of appeal, must be transmitted to the supreme court; which cannot be unless the same is reduced to writing; and no new supplementary evidence can be received in the supreme court, except in admiralty and prize causes, which rule presupposes that all the old evidence is

[1] The statute of 1789, ch. 20, § 30, 1 U. S. Stats. at Large, 89, provides that in certain cases, to be mentioned hereafter, the clerk of the district court shall take down the evidence.

[2] The 6th rule of the circuit court for the Northern District of New York, allows a copy of the notes taken by the judge to be evidence, and further extends the rights given by the statute cited in the preceding note.

[3] 2 U. S. Stats. at Large, 244.

[4] Act of 1802, ch. 31, § 25, 2 U. S. Stats. at Large, 166.

already in the record."[1] Mr. Conkling, on the other hand, contends that the 30th section of the judiciary act, enjoining the examination of witnesses in open court, applies equally to cases in the circuit as in the district courts, and cites the remainder of the section, which he says precludes the possibility of a doubt of the fact. This section is as follows: "In the trial of any cause of admiralty or maritime jurisdiction in a district court, the decree in which may be appealed from, if either party shall suggest to, and satisfy the court that probably it will not be in his power to produce the witnesses there testifying before the circuit court, should an appeal be had, and shall move that their testimony be taken down in writing, it shall be so done by the clerk of the court. And if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the court which shall try the appeal, that the witnesses are then dead or gone out of the United States, or to a greater distance than as aforesaid from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity, or imprisonment, they are unable to travel and appear at court, but not otherwise."[2] But we hardly think this meets the objection of Mr. Justice Story. The question is not so much the import of the act of 1789, as it is the effect of the act of 1803. The section above cited by Mr. Conkling makes no provisions for reducing the evidence in the circuit court to writing, which must be in that state in order that the act of 1803 may be complied with.[3] In 1846, a rule was adopted by the circuit court for the first circuit, which provides that "in all causes in admiralty the testimony shall be in writing, unless for special cause shown, the court shall allow witnesses to be examined orally upon the stand."

And it is now provided by the fifty-second admiralty rule, that further proof[4] taken in a circuit court upon an admiralty appeal,

[1] The Sch. Boston, 1 Sumner, 328, 332.

[2] 1 U. S. Stats. at Large, 89.

[3] In Conn *v.* Penn, 5 Wheat. 424, the question arose as to the proper manner of taking evidence in an equity suit in the supreme court. The extent to which the act of 1803 overrules the preceding acts was not decided, the court stating that they felt considerable doubts on the subject, but it was held that all the testimony on which the judge in the court below founded his opinion must be before the court and appear on the record, and the evidence having been taken orally in the court below, the cause was remanded for further proceedings.

[4] 13 How. In The Enterprise, 2 Curtis, C. C. 317, 321, Mr. Justice *Curtis*,

shall be by deposition taken before a commissioner, or before some officer authorized to take depositions by the thirtieth section of the act of congress of 1789, upon an oral examination and cross-examination, unless the court or one of the judges shall allow upon motion a commission to issue upon written interrogatories and cross-interrogatories. And the rule also provides that when oral evidence is taken down by the clerk of the district court, and is transmitted to the circuit court, it may be there used in evidence, saving to either party the right to take the deposition of the party if he should so elect.

The act of 1803, ch. 40,[1] provides that on the hearing of an appeal in the supreme court no new evidence shall be received, except in admiralty and prize causes.[2] The manner of taking such evidence is pointed out by the twelfth general rule of the supreme court which we give in our note.[3]

The court has the power, when it is deemed expedient, to refer any matters arising in the progress of the suit, to one or more commissioners to hear the parties, and make report thereon.[4] And in such a case the report will not be disturbed, unless it is shown to be affirmatively in the wrong.[5]

said: "In the suit *in rem*, numerous technical objections were taken to the admissibility of the depositions sent up to this court from the district court. I consider these depositions to have been taken as further proof under the rule of the supreme court on that subject."

[1] 2 U. S. Stats. at Large, 244.

[2] See Hawthorne *v.* The United States, 7 Cranch, 107; The Brig James Wells *v.* The United States, 7 Cranch, 22.

[3] "1. In all cases where further proof is ordered by the court, the depositions which shall be taken, shall be by a commission to be issued from this court, or from any circuit court of the United States. 2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: Provided, however, that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where, by law, it is admissible." 21 How. This rule is the same as the old 25th and 27th general rules. In the Massachusetts district the practice for many years prior to this rule was, for the clerk to issue a commission as a matter of course, on written interrogatories and cross-interrogatories being filed.

[4] 44th Admiralty Rule.

[5] Taber *v.* Jenny, U. S. D. C., Mass., 19 Law Reporter, 27.

SECTION III.

OF PRIZE CAUSES.

It may be necessary to speak of the rules and practice of admiralty peculiar to prize causes.[1] The duty of the master of the capturing ship in relation to the documents on board the prize is pointed out by statute.[2] And he should make affidavit that he has complied with its requirements.[3] The master of the prize, and principal officers, and some of the crew should be brought in;[4] and the persons on board the prize are in the first place examined on the standing interrogatories prepared by the court for such purposes.[5] Only those persons on board the prize, and others introduced by special order of the court, are examined.[6] This examination should take place without delay, and the commissioners must see that the inquiries are properly put and answered with all the minuteness of detail that is necessary to procure a full, explicit, and substantial answer to every question.[7] And no counsel are permitted to be present;

[1] See the elaborate essays of Mr. Justice *Story* on this subject in 1 Wheat. App. 494, and 2 Wheat. App. 1.

[2] Act of 1800, ch. 33, art. 7, 2 U. S. Stats. at Large, 46. This provides that he "shall carefully preserve all the papers and writings found on board, and transmit the whole of the originals unmutilated to the judge of the district to which such prize is ordered to proceed, and shall transmit to the navy department, and to the agent appointed to pay the prize-money, complete lists of the officers and men entitled to a share of the capture, inserting therein the quality of every person rating, on pain of forfeiting his whole share of the prize-money resulting from such capture, and suffering such further punishment as a court-martial shall adjudge." See also, Act of 1813, ch. 13, 2 U. S. Stats. at Large, 792.

[3] In 1 Wheat. App. 496, it is said that the prize master should "make an affidavit that the papers are delivered up as taken, without fraud, addition, subduction, or embezzlement."

[4] 1 Wheat. App. 496.

[5] The English standing interrogatories may be found in 1 Rob. Adm. 381. The American in 2 Wheat. App. 81. In the Southern District of New York, there are distinct prize rules which may be found in Dunlap's Adm. Practice, 2d Ed., 368.

[6] The Eliza & Katy, 6 Rob. Adm. 185, 189; The Henriek & Maria, 4 Rob. Adm. 43, 57; The Haabet, 6 Rob. Adm. 54.

[7] The Ann Green, 1 Gallis. 274, 284.

but it is the duty of the commissioners to superintend the regularity of the proceeding, and to protect the witnesses from surprise, or misrepresentation, and after the deposition is taken, each sheet is read over to the witness, and separately signed by him.[1] The witnesses are examined apart from each other, and successively, before the depositions are closed and sent to the court, for after this is done, the commissioners cannot take further evidence without a special order.[2] And in one case where, two days after the vessel came into port, a person representing himself to be the supercargo, went before the commissioners and offered papers in his possession, in behalf of the claimants, the commissioners refused to examine him and were sustained by the court.[3] And only the papers and documents delivered up to the captors are admissible, and if the captured conceal any, they cannot afterwards put them in.[4] The case is determined only on this evidence and the documents of the prize,[5] unless the court admit something more for good reason; and they do this very reluctantly. If, however, the case demands it, they will require further proof, from either party alone, or from both.[6]

[1] The Apollo, 5 Rob. Adm. 286.

[2] The Speculation, 2 Rob. Adm. 293.

[3] The Anna, 1 Rob. Adm. 331.

[4] The Ann Green, 1 Gallis. 274.

[5] The Dos Hermanos, 2 Wheat. 76; The Ann Green, 1 Gallis. 274, 281.

[6] In The Dos Hermanos, 2 Wheat. 76, Mr. Justice *Story* said: "Farther proof is not a matter of course. It is granted in cases of honest mistake or ignorance, or to clear away any doubts or defects consistent with good faith. But if the parties have been guilty of gross fraud or misconduct, or illegality, farther proof is not allowed; and under such circumstances, the parties are visited with all the fatal consequences of an original hostile character." Where there is a repugnance between the documents and the depositions, the conviction of the court need not be kept *in equilibrio* till it can receive further proof. The Vigilantia, 1 Rob. Adm. 1, 7. Further proof has been allowed where the suspicion or doubt was caused by extrinsic evidence. The Romeo, 6 Rob. Adm. 351. But this is certainly pressing the point very far. A summary of the English cases where further proof was allowed, and which was written by Mr. Justice Story, may be found in the appendix to the first volume of Wheaton, p. 504. See also, The London Packet, 2 Wheat. 371; The Pizarro, id. 227; The Frances, 8 Cranch, 348; The Grotius, id. 456; The Adeline, 9 Cranch, 244; The Mary, 8 Cranch, 388; The Venus, 1 Wheat. 112; The Fortuna, 2 Wheat. 161, 3 Wheat. 236; The Friendschaft, 3 Wheat. 14; The Atalanta, 3 Wheat. 409, 5 Wheat. 433; The St. Lawrence, 8 Cranch, 434; The Dos Hermanos, 2 Wheat. 76; The Hazard *v.* Campbell, 9 Cranch, 205; The Anne, 3 Wheat. 435; La Nereyda, 8 Wheat. 108; The Amiable Isabella, 6 Wheat. 1.

Here, oral testimony is never admitted, but it must be taken and reduced to writing under an order of court.[1]

It must however be remembered, "that the property subjected to the prize jurisdiction is itself, in the first instance, a part of the necessary evidence in the cause, upon which acquittal or condemnation must go, and that the court will, upon laying a proper foundation, direct a survey, in order to ascertain its nature and character."[2]

Although the evidence of the captors is not allowed,[3] yet papers from other causes, and papers found on board other ships, are sometimes permitted, and, in the language of Mr. Justice *Story*, "in other instances of pregnant suspicion, or reasonable doubt, the courts will not suffer a rule, founded upon the mere convenience of practice, to exclude the captors from the benefit of diligent inquiries."[4] But on an application for further proof, the court refused to allow the captors to put in a letter which had been taken from the vessel previous to her capture by another vessel.[5]

In cases of joint and collusive capture, the usual simplicity of prize proceedings is necessarily departed from, and where there is the least doubt, other evidence than that arising from the captured vessel, or invoked from other prize causes, may be resorted to.[6]

In causes of prize, the ownership is a fact of great and decisive importance; and of this the bill of sale — a document in universal use — is almost conclusive evidence.[7]

The principal grounds for condemning a ship as prize, where

[1] The Dos Hermanos, 2 Wheat. 76. See ante, p. 724, n. 4.

[2] The Liverpool Packet, 1 Gallis. 513, 520.

[3] The Sarah, 3 Rob. Adm. 330.

[4] The Ann Green, 1 Gallis. 274, 282. See also, The Vriendschap, 4 Rob. Adm. 166; The Romeo, 6 Rob. Adm. 351. But see Dearle *v.* Southwell, 2 Lee, 93, where it was doubted whether proceedings could be invocated except where the cause was between the same parties or on the same point. In The Experiment, 4 Wheat. 84, it was held that depositions taken in one prize cause as further proof were not admissible in another prize cause, but the rule was said to be that original evidence taken on the standing interrogatories was.

[5] The Sarah, 3 Rob. Adm. 330.

[6] The George, 1 Wheat. 408.

[7] The Vigilantia, 1 Rob. Adm. 1; The Sisters, 5 id. 155; The San Jose Indiano, 2 Gallis. 268, 284.

the question of nationality is in dispute, are, 1. The entire want of the necessary papers; 2. Their destruction; 3. Their material alteration or falsification; and, 4. The time when the papers were made out, as whether before or after the war, is often material. 5. Next in importance, is the conduct of the master and officers; 6. Their prevarication or evident falsehood in the preliminary proof; 7. Their refusal or inability to give a good account of the ship and cargo; 8. The domicil of the master and officers.

The spoliation of papers, by which is meant, not merely their total destruction, but such falsification as makes them useless or worse, as evidence, is said to be regarded by the law of nations as conclusive evidence of hostile character or other liability to capture. In England, the courts permit it to be explained,[1] and, the admiralty courts of this country, are, perhaps, even more lenient than those of England.[2] It is, however, always and every where, a circumstance of grave suspicion.

The interest of witnesses does not render them incompetent in prize causes, any more than in those of salvage, and for the same reason of necessity. But their interest requires the court to watch them narrowly.[3]

The official declarations of the proper authorities of a foreign State, are evidence of facts which are within the scope of their authority, and the proper subjects of such declaration.[4]

Certain presumptions of law exist in causes of prize, and should be stated. Possession by an enemy is presumptive proof, though not conclusive, of hostile character.[5] So, ships are presumed to belong to the country under whose flag they sail. And it has been thought that this presumption should be conclusive, on

[1] See The Hunter, 1 Dods. 480; The Rising Sun, 2 Rob. Adm. 104; The Maria Magdalena, id. 106. In The Two Brothers, 1 Rob. Adm. 131, the suppression of papers, though said not to be cause for condemnation, was held to raise great suspicion, and the defence that they were merely private papers was held to be no excuse.

[2] See The Pizarro, 2 Wheat. 227.

[3] The Anne, 3 Wheat. 435; The Grotius, 9 Cranch, 368. See also, The Falcon, 6 Rob. Adm. 194, 197; The James Cook, Edw. Adm. 261; The Diana, 2 Gallis. 93, 97; The Magnus, 1 Rob. Adm. 31, 35.

[4] The Huntress, 6 Rob. Adm. 104, 110.

[5] The Resolution, 2 Dall. 19. See also, The Countess of Lauderdale, 4 Rob. Adm. 283; The Magnus, 1 id. 31.

the ground that no owner should be permitted to deny the character under which he seeks protection and safety.[1] In joint capture, all public ships of war in sight are presumed to assist, and therefore to have a right to share in the proceeds,[2] and this presumption extends to all the ships of a squadron united by authority for a specific purpose,— as for a blockade, for example,— although not actually in sight.[3] These presumptions do not apply to privateers,[4] because they are not obliged to capture all vessels they meet, as are vessels of war. And revenue cutters, as they are generally employed to protect the revenue, and have no special injunction to capture enemy's vessels, come under the same rule as privateers in this respect.[5]

SECTION IV.

OF COSTS IN ADMIRALTY.

Costs in admiralty do not necessarily follow the result of the suit, but are entirely within the discretion and control of the court, and although each court has certain rules to which it adheres under ordinary circumstances, it does not hesitate to make such a special decree as to costs in any case, as the merits and the justice of that case, or public policy, may seem to require.

The general rule may be said to be the same in admiralty as at common law and in equity, that costs follow the result, and that the successful party is entitled to them.[6] But this rule is often departed from in practice. Thus, costs have been decreed for the plaintiff where he recovered no debt, because he had been induced to begin the suit by the misconduct of the defendant.[7]

[1] The Vigilantia, 1 Rob. Adm. 1; The Vrow Anna Catharina, 5 id. 161; The Success, 1 Dods. 131; The Fortuna, id. 81.

[2] The Robert, 3 Rob. Adm. 194; The Dordrecht, 2 Rob. Adm. 55.

[3] The Forsigheid, 3 Rob. Adm. 311, 316.

[4] The Santa Brigada, 3 Rob. Adm. 52; La Flore, 5 Rob. Adm. 268.

[5] The Bellona, Edw. Adm. 63.

[6] In The Segredo, 1 Spinks, Adm. 36, 63, the court said that costs were given in that case because, "It is now laid down by all the courts that costs are to follow the results of the case."

[7] Pettit's Case, U. S. D. C., Mass., Dunlap's Adm. Practice, 102.

And in salvage it has been said that the general rule must be applied with somewhat greater leniency and relaxation because of the expediency of encouraging salvors in the rescue and preservation of property upon the seas.[1] So, in a case where a legal set-off was to be made against the claim of a mate for wages, which would have been more than his wages, the court ordered that the claim for wages and costs should be allowed in full, and then the set-off made only against this amount.[2] And costs are not decreed against seamen, if they had any probable cause for bringing their action, unless it is clearly shown that they are able to pay them.[3] If many suits are brought where all the interests might have been embraced in one, only the costs of one are allowed.[4] So the costs of further answers are made to fall on the defendant, if they are made necessary by his fault.

The taxable costs are now regulated by statute and need not be considered here.[5] Counsel fees have been sometimes allowed as part of the costs,[6] but we presume that they would not be now except to the extent prescribed by the above statute.

The subject of costs upon an appeal to the supreme court has

[1] The Princess Alice, 3 W. Rob. 138, 143. From this reasoning it might be inferred that where salvors were entitled to recover they should have their costs, but in The Red Rover, 3 W. Rob. 150, a claim of salvage was pronounced for but without costs, the nature of the claim being very trivial.

[2] Anonymous, U. S. D. C., Mass., Dunlap's Adm. Practice, 102.

[3] See ante, p. 698, n. 1.

[4] The Henry Ewbank, 1 Sumner, 400, 408.

[5] Act of 1853, ch. 80, 10 U. S. Stats. at Large, 161. The Act of 1847, ch. 55, 9 U. S. Stats. at Large, 181, provided that where the amount recovered was less than $100, the costs should not be more than 50 per cent. of the amount, and should be divided in a certain way. But it has been held that this statute is repealed by the act of 1853, and full costs are now allowed although the amount is less than one hundred dollars. The Sloop Canton, 21 Law Reporter, 473. Under the first section of the act of 1853, which provides that "in case the debt or claim shall be settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per cent. on the first five hundred dollars of the claim or decree, and one half of one per cent. on the excess over five hundred dollars," it has been held that where the claim was settled before the claimant appeared in court, the marshal was not entitled to the commission. Bone *v.* Steamer Norma, 1 Newb. Adm. 533.

[6] The Apollon, 9 Wheat. 362. Mr. Justice *Story*, in delivering the opinion of the court, said: "The fifth item, allowing five hundred dollars as counsel fees, is, in our opinion, unexceptionable. It is the common course of the admiralty to allow expenses of this nature, either in the shape of damages, or as part of the costs. The practice is very familiar on the prize side of the court. It is not less the law of the court in instance causes, it resting in sound discretion to allow or refuse the claim."

been a matter of much controversy, but it is now settled by a general rule of the court passed in 1838.[1] This provides that "In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction,[2] costs shall be allowed for the defendant in error, or appellee, as the case may be, unless otherwise agreed by the parties.

"In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error, or appellee, as the case may be unless otherwise ordered by the court.

"In all cases of reversals of any judgment or decree in this court,[3] (except where the reversal shall be for want of jurisdiction,[4]) costs shall be allowed in this court for the plaintiff in error or appellant, as the case may be, unless otherwise ordered by the court.

"Neither of the foregoing rules shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.[5]

"In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

"When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail."

[1] Rule XLV., 1 How. xxxvi. This rule is now the 24th, 21 How. xiii.

[2] M'Iver *v.* Wattles, 9 Wheat. 650. In Winchester *v.* Jackson, 3 Cranch, 514, decided before the above rule was passed, costs were allowed upon a dismission of a writ of error for want of jurisdiction, the original defendant being also the defendant in error. In Strader *v.* Graham, 18 How. 602, a suit was brought in a State court and decided in favor of the plaintiff. The defendant then sued out a writ of error to the Supreme Court of the United States, and the writ of error was dismissed for want of jurisdiction. The original plaintiff then applied to have his costs in the supreme court taxed, but the court refused to do so, as the cause was dismissed for want of jurisdiction.

[3] Bradstreet *v.* Potter, 16 Pet. 317.

[4] Montalet *v.* Murray, 4 Cranch, 46. The clause in brackets is omitted in the new rule.

[5] United States *v.* Boyd, 5 How. 29.

If judgment is entered up in the supreme court and a blank left for the amount of the costs, it is competent for the court below, at a subsequent term, to tax the costs and have the blank filled *nunc pro tunc*.[1] If the judgment of the court below is reversed, the appellant is of course entitled to his costs in that court.[2] And a judgment for costs includes all the costs belonging to the suit whether prior or subsequent to the rendition of the judgment.[3] If the libel is dismissed "without costs to either party," the liability of a party to the clerk for his fees for services rendered to such party, is not thereby affected.[4]

At common law where costs always follow the result, it is necessary to decide claims to nominal damages upon strict legal principles, but in admiralty, where costs are discretionary, suits for mere nominal damages, unless they are so connected with a substantial right, that it can only be vindicated in this way, will not be entertained.[5]

SECTION V.

OF TENDERS.

In the courts of common law the doctrine of tender is very precise, and the practice equally so. But this is not so in admiralty; there the thing itself is approved and encouraged, and all questions relating to it are determined only *ex æquo et bono*. Any real offer to pay, by one then ready and able to pay, is treated as a valid tender without inquiring whether the money was produced or not, or in what form; and if an objection be made as to the method of tender, he who makes it is allowed a reasonable time to procure the means required. If a fair settlement be offered, the plaintiff, though he succeed, will not get his costs, and may have to pay them.[6] In England tenders are

[1] Sizer *v.* Many, 16 How. 98.
[2] M'Knight *v.* Craig, 6 Cranch, 183; Riddle *v.* Mandeville, 6 Cranch, 86.
[3] Peyton *v.* Brooke, 3 Cranch, 92.
[4] In the matter of Stover, 1 Curtis, C. C. 201.
[5] Barnett *v.* Luther, 1 Curtis, C. C. 434.
[6] See Dunlap's Adm. Practice, 103.

more strictly regarded, in cases of salvage,[1] and this has been so said in this country,[2] where every thing of this sort is usually done by formal acts in court. But if a distinct and sufficient tender of compensation and costs up to the time of tender, were made, actually and in good faith, and rejected, we do not believe the salvors would in this country be permitted to recover their costs, however informal it might be.[3] And it has been held, that if such a tender is made in England and the parties refuse to accept it, but proceed in the case, they are not entitled to subsequent costs.[4]

[1] The Vrow Margaretha, 4 Rob. Adm. 103. The tender does not appear to have been made in this case until after the suit was commenced, and it was a verbal one, and the evidence rendered it uncertain whether it was intended to include costs. Sir W. *Scott* held under these circumstances that although the amount tendered was a sufficient compensation for the services performed, yet costs should be allowed; and said: "I see enough of the inconvenience of proceeding in this loose manner, to make it necessary for me to require in future, as an universal rule of court, that a tender should be made, in the first stage of the proceeding, in a regular form. The court will then consider its sufficiency; and if it shall be pronounced sufficient, the court will make the party who refuses such an offer, liable not only to his own costs, but also to those of the other party, if it shall appear that proceedings have been vexatiously pursued." And in The Ocean, 1 W. Rob. 334, it was held, that where it was alleged in an act on petition that certain services had been rendered, and certain damages sustained, a tender to stop the action and to entitle the party making it to all the benefits of a tender in court, must include all the damages as well as the compensation.

[2] Evans *v.* The Ship Charles, 1 Newb. Adm. 329.

[3] See Hessian *v.* The Edward Howard, 1 Newb. Adm. 522. In a note to Mayo *v.* Snow, 2 Curtis, C. C. 102, 103, it is said: "I am informed that in the district court, *Sprague*, J., on the question of tender, held, that an offer to pay, made in good faith, with undisputed ability and readiness to perform, renewed in the answer in court, was a good and sufficient tender in the admiralty, although originally accompanied with a request for a receipt, and although the money was not subsequently brought into court."

[4] The John & Thomas, 1 Hagg. Adm. 157, n.; The Eleanora Charlotta, id. 156. See also, The Frederick, id. 211, 218. In The Emu, 1 W. Rob. 15, where a tender in a salvage suit, was pronounced to be sufficient, no costs were given, but the court stated that in future cases where a tender was pronounced for, and held to be sufficient, costs would always be given. We should construe this language to mean that costs would be given against the salvors, for the learned judge went on to say: "When the question as to the sufficiency of the tender is nicely balanced, the court will not consider itself bound to give costs, but the general principle will be in favor of costs." In The Batavier, 1 Spinks, Adm. 169, the tender was pronounced sufficient, and the salvors condemned in costs. The general principle was stated by Dr. *Lushington* in the case of The Queen, cited 1 Spinks, Adm. 175, as follows: "The rule I have endeavored to follow is not to bind myself in all salvage cases to give costs against salvors, unless I think the tender was so large that the salvors in the exercise of a sound discretion could not do otherwise than accept it. Here I think the tender is sufficient, but it is not so much as

The costs of a suit have been cast upon a proctor whose misconduct caused the suit and the expense.[1] If a tender be made in admiralty and rejected, the court will afterwards, for good cause, reduce the amount and decree a less sum to the libellant.[2]

SECTION VI.

OF THE DECREES IN ADMIRALTY.

The decrees in admiralty are moulded by the court to meet the exigencies of each case. They are sometimes in writing, and after such delay as the court deem proper; sometimes spoken by the court, with or without delay, and reduced to writing by the clerk. And if, after the case is heard, the court incline to the opinion that either party has not yet made out his full case, or full defence, but may do so if delay and further opportunity for proof, and a rehearing are granted, the court will make such order, instead of a decree on the merits. And even after a decree is made, we should be inclined to hold that the court have the power of varying the same for the purpose of correcting any mistake or oversight, although such a power would be used cautiously and perhaps reluctantly. This subject is interesting, and has been much considered by the courts; and we give the authorities at some length in our note.[3] It is to be noticed, however, that this

to lead me to blame the salvors for not accepting it. I therefore pronounce for the tender, but without costs." See also The Albatross, and the case of The Chancellor, both cited 1 Spinks, Adm. 175. In the subsequent case of The Paris, 1 Spinks, Adm. 289, 291, Dr. *Lushington* said: "I consider it my duty to pronounce for the tender; and, I am sorry to say, to condemn the parties in the costs. That is a measure which I am reluctant to pursue, though, according to the practice in other courts, where the tender is considered sufficient, they uniformly follow that course. I have considered myself justified in some cases in not proceeding to that extremity on grounds of public policy, but in this case I see no sufficient grounds for departing from the rule."

[1] The Frederick, 1 Hagg. Adm. 211, 225.

[2] The General Palmer, 2 Hagg. Adm. 176, 180. Salvors who refused a tender were in one case obliged to pay costs. The Albion, 2 Hagg. Adm. 180, note.

[3] The question was elaborately discussed in the case of The Monarch, 1 W. Rob. 21. The suit was a cause of collision before Sir J. *Nicholl*, and he decreed that both parties were equally in fault, and condemned the owners of one of the ships in a moiety of the

subject is not touched upon by the new admiralty rules of the supreme court, with the exception that the twenty-ninth rule provides

amount of such damage, and of the costs incurred on behalf of the other party and referred the case to the registrar and merchants to determine the amount of the damage, etc. It will be noticed that this was an interlocutory, and not a final decree. Sir J. Nicholl afterwards died, and an application was made to Dr. *Lushington*, then judge of the court, to vary the decree in question as regarded the costs, on the ground that it was inequitable, and that the late judge could not have intended to burden one side with three fourths of the expenses. Affidavits were also offered to show that the registrar had not taken down the decree aright, but Dr. *Lushington* refused to receive the affidavits, especially as the registrar stated that he subsequently took the opinion of the late judge as to the accuracy of the decree in question. The House of Lords had previously decided that where both vessels were in fault, each should bear its own costs, and Dr. *Lushington* referred to the power of the court of chancery to alter, vary, and amend a decree before its enrolment, and stated that he was at a loss to conceive upon what grounds a court of admiralty in its equitable jurisdiction was to be precluded from a similar discretionary authority, and said: "In the exercise of this authority I should, I trust, use the greatest caution, and the limit which I would propose to myself in future cases is this, merely to make such an alteration of an error arising from defect of knowledge or information upon a particular point, as the justice of the case requires; at the same time let it be understood, that it must be an error instantly noticed and brought to the attention of the court with the utmost possible diligence." With respect to the case before the court, the learned judge stated that he should vary the decree to the extent of making it accord with the judgment of the House of Lords.

In The Martha, Blatchf. & H. Adm. 151, a libel for wages was prematurely filed. The defendant pleaded a dilatory plea and joined with it a defence on the merits. After a full hearing, the court ordered the vessel to be restored without costs, on the ground that the defence on the merits was not sustained, and the libellant failed on account of having brought the suit too soon. A decree to this effect was entered, and at the next term the counsel for the claimant applied to the court for leave to reargue the question of costs, and a manuscript decision of the circuit court was produced overruling the doctrine of the court on the merits of the case, so that the claimant should have been entitled to a judgment on the merits. And, after hearing counsel on both sides, the court decreed that costs should be awarded. The question then arose whether the surety for costs was liable or only the libellant. It was contended that the court had no right to reverse the first decree, subsequent to the term at which the decree was rendered, and Mr. Justice *Betts* so held, and pronounced the last decree a nullity, and the rule was said to be that a rehearing could not be granted except with the free consent of all the parties to be affected by it.

In the case of The Steamboat New England, 3 Sumner, 495, a decree for salvage was rendered, but it was discovered after the final adjournment of the court, that by a mistake of the time, nature, and operation of the decree, the benefit intended by it to the salvors was wholly defeated, and they were burdened with expenses beyond the salvage awarded. The mistake was discovered the morning after the final adjournment, and an application was made to the district judge to allow an appeal. The minutes only of the decree had been stated while the court was in session, and the decree was not drawn out in form until the morning after the final adjournment. The judge of the district court refused to allow an appeal, but application for leave to file one was made by all the salvors except one, who filed a petition in behalf of himself and the

that in case of a default for not answering the libel, the court may in its discretion set aside the default, and upon application of the defendant, admit him to make answer at any time before the final hearing and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor, and by the fortieth rule the court has discretionary power to grant a rehearing on the like terms in case a decrée has passed against the defendant by default, if the motion is made within ten days after the decree is entered, the defendant submitting to such further order and terms as the court may direct.[1] In New York, rules have been passed giving the court power to grant a rehearing if application is made at the term when the decree is pronounced, or there is a stay of proceeding by order of the judge. It is also provided that no libel of review will be entertained in causes subject to

other salvors in the nature of a libel for a rehearing, or of a libel of review, in the district court. This petition was dismissed by the district court, for want of jurisdiction, and an appeal taken. Mr. Justice *Story* held that the decree pronounced by the district judge was an interlocutory, and not a final decree, and that the district court had the power to vary and amend it. The general power of the court to alter its decrees was considered at length, and the conclusions of the learned judge were that a court of admiralty has the power to rehear a cause after a decree has been pronounced, pending the term, and before the proceedings have been finally enrolled or drawn up and entered on the record, if there was a manifest mistake, going substantially to the merits even with some slight ingredients of negligence on that side, and without any circumstances of fraud on the other. Great doubt was expressed whether a rehearing could be granted after a final decree was made, but it was thought that a libel in the nature of a bill of review in equity would lie after a final decree, under similar circumstances as in equity, and the learned judge said: "But upon the most careful reflection, which I have been able to bestow upon it, the result to which I have brought my mind is, that if the district court has a right to entertain a libel of review in any case, it must be limited to very special cases, and either where no appeal by law lies, because the matter is less in value than is required by law to justify an appeal, or the proper time for any appeal is passed, and the decree remains unexecuted; — or where there is clear error in matter at law; or, if not, where the decree has been obtained by fraud; or where new facts, changing the entire merits, have been discovered since the decree was passed, and there has been not only the highest good faith (*uberrima fides*), but also the highest diligence and an entire absence of just imputations of negligence; and finally, where the principles of justice and equity require such an interference to prevent a manifest wrong. Further than this I am not prepared to go; and I may say, that with my present impressions I should go thus far with some hesitation, and pause at every step." See also, The Enterprise, 2 Curtis, C. C. 317.

[1] It has been held that the respondent must show that he has not been guilty of any laches, and that he must also exhibit a meritorious defence either by answer or affidavit, before the court will order a default to be taken off under this rule. Scott v. The Young America, 1 Newb. Adm. 107.

appeal, nor unless it is filed before the enrolment of the decree or return of final process. And, even after any decree, any person having an interest in the proceeds, may intervene for them by petition praying for a delivery thereof to him for reasons stated.[1] If separate interests and claims are joined in one libel, to which there is but one answer, the court may nevertheless make separate decrees for each separate interest, and should do so whenever this may affect the question of costs or appeal.

The decrees may be final, or interlocutory, and they may be interposed at any stage of the proceedings to effect any purpose which the justice of the case requires.

If the action be *in rem* and the property in the custody of the court, if the libellant prevails, there is a decree of condemnation and sale, and the terms and mode of the sale, and satisfaction of the libellant's claim are usually specified in the decree. If the libellant *in rem* has shown a clear legal right to a condemnation and sale, it is said that the court have no discretionary power to refuse or delay a sale.[2] And generally, wherever any specific relief is prayed for, although there be connected with it a prayer for general relief, the court have no power to grant a relief which is either inconsistent with or different from that which is prayed.[3]

So, the decree may be for further proofs, or for delivery or restoration of the property to the owner; in which case a warrant of restoration follows. If the respondent has taken the property on stipulation, sometimes this warrant is made, and sometimes the decree only; but if the libellant prevails, the respondent may surrender the property to the court; if however, he does not, execution will issue on the stipulation at once, except in revenue cases, in which certain delay is required by acts of congress.

If, in a libel of information, the respondent prevails, the courts give to the prosecuting or seizing officer a certificate of probable cause, if in their judgment, he had such cause for the seizure, and this protects him from prosecution for making the same.[4] The

[1] See ante, p. 548–551.

[2] Davis *v.* A New Brig, Gilpin, 473.

[3] Wilson *v.* Graham, 4 Wash. C. C. 53.

[4] Act of 1799, ch. 22, § 89, 1 U. S. Stats. at Large, 696; Act of 1807, ch. 19, 2 U. S. Stats. at Large, 422.

final decree of the courts of the United States, in a case of forfeiture regularly before them, is conclusive.[1] If the seizing officer refuse to institute proceedings to determine whether there should be forfeiture, the district court may compel him to proceed to adjudication or abandon the seizure. If the seizure be adjudged wrongful and without probable cause, the owner may elect to seek his indemnity at common law in the State courts, or in the instance court of admiralty, but he can have no remedy at common law, in the courts of the United States.

Decrees in admiralty should be *secundum allegata*, as well as *secundum probata*, and the libellant is not permitted to set forth one thing in his libel and prove another.[2] The reason of the rule is obvious. It is, that the respondent may know the exact case he has to meet, and prepare himself accordingly. But it has been held, that if the allegations of the libellant in a cause of collision, imputing fault to the vessel proceeded against, are not sustained by the evidence, yet, that if the facts admitted by the respondent, or set forth in his answer, show that he was in fault, the libellant may recover.[3]

[1] Gelston *v.* Hoyt, 3 Wheat. 246.

[2] McKinlay *v.* Morrish, 21 How. 343; The Hoppet *v.* The United States, 7 Cranch, 389. See also, Jenks *v.* Lewis, Ware, 51; The Sch. Boston, 1 Sumner, 328, 331; Ward *v.* The Brig Fashion, 1 Newb. Adm. 41, 6 McLean, C. C. 195.

[3] The Clement, 2 Curtis, C. C. 363. The libel alleged that both vessels were on the starboard tack, the pilot-boat (the libellant) close to the wind, and to the leeward of the brig (the respondent), when the brig suddenly changed her course, and kept off, and struck the pilot-boat, which was sunk, etc. The answer denied that the brig kept off and struck the pilot-boat, but stated that she kept her course until she luffed to lessen the force of the collision. The district court was of the opinion, that the allegations of the libel were not sustained by the evidence, but that it appeared that the case was one of two vessels sailing in converging courses on the same tack, the pilot-boat close-hauled, and the brig with the wind two points free; that the rule of navigation required the brig to avoid the pilot-boat, unless there were special circumstances to render the rule inapplicable, and a decree was entered for the libellant. In the circuit court it was contended, that the decree should be reversed, because it was rested upon facts not alleged in the libel, but Mr. Justice *Curtis* sustained it for the reasons set forth in the text. Upon appeal to the supreme court, that court was equally divided, but as no opinion was given, we cannot state on what point the judges differed. Reference is made by the learned judge to that class of collision cases, where the decree is in conformity with the separate allegations of neither of the parties, namely, cases of mutual fault, where the libellant states that his vessel exercised due care, and imputes fault to the vessel proceeded against, while the claimant denies the fault imputed to him, and alleges that the vessel of the libellant is in fault, and the court finds part of the allegations in each pleading to be true, and divides the loss. But in the present case, no part of the libel

The circuit court, as we have seen, does not remit the case to the district court, but executes its own decrees.[1] The supreme court, however, remits the case to the circuit court, and by a mandate directs what disposition shall be made of the case.

imputing fault, was sustained by the pleading, and we are unable to see the analogy between the two cases. Some stress, moreover, appears to be laid on the remark of Dr. *Lushington* in The Lady Anne, 1 Eng. L. & Eq. 670, 674, namely: "It is quite evident, in this case, that the point on which it has hinged has never been touched upon at all in the pleadings." It seems, however, to have escaped the notice of the learned judge, that the privy council for this very reason remitted the case to the admiralty court, with the directions that it should be further written to.

In Dupont de Nemours *v.* Vance, 19 How. 162, an action was brought on a contract of affreightment against the vessel for non-delivery of goods. The answer set up a necessary jettison of that part of the cargo which was not delivered. The court found that this defence was sustained by the evidence, but allowed the libellant to recover the general average due from the vessel, although not claimed in the libel. Mr. Justice *Curtis* delivered the opinion of the court, which proceeded mainly on the grounds stated in the case of The Clement, *supra*. See also, Burton *v.* Salter, U. S. C. C., Mass., 21 Law Reporter, 148.

[1] The Roarer, 1 Blatchf. C. C. 1. The decree in this case had been in favor of the libellants in the district court. Only one of the respondents appealed to the circuit court, and this appeal was afterwards dismissed as to some of the libellants, the sums severally awarded to them not being sufficient to justify the appeal. On the hearing, the decree of the district court was reversed, as between the appellant and those of the libellants who remained as appellees. The decree contained no provision as to so much of the decree below, as was not appealed from, and on motion being made to affirm it so far as it was not appealed from, Mr. Justice *Nelson* held, that the whole decree came up by the appeal, but as to that part not appealed from, it was not open to controversy, and the motion was denied.

CHAPTER IX.

FINAL PROCESS.

THIS is provided for by the 21st admiralty rule of the supreme court, as follows: "In all cases where the decree is for the payment of money, the libellant may, at his election, have an attachment to compel the defendant to perform the decree, or a writ of execution in the nature of a *capias* and of a *fieri facias*, commanding the marshal, or his deputy, to levy the amount thereof of the goods and chattels of the defendant, and for want thereof, to arrest his body to answer the exigency of the execution. In all other cases, the decree may be enforced by an attachment to compel the defendant to perform the decree; and upon such attachment, the defendant may be arrested and committed to prison until he performs the decree, or is otherwise discharged by law, or by the order of the court."

This rule seems more particularly applicable to suits *in personam*, for in suits *in rem* the process is a decree of sale, directing the marshal to sell the property and to pay the proceeds into court.

The liabilities of sureties we have already considered.[1]

Executions obtained for the use of the United States in any of the courts of the United States, in one State, may run and be executed in any other State, or in any of the Territories of the United States, but shall be issued from and made returnable to the court where the judgment was obtained.[2] And all writs of execution, upon any judgment or decree, obtained in any of the district or circuit courts of the United States, in any one State, which is or may be divided into two judicial districts may run and be executed in any part of such State, but shall be issued

[1] See ante, p. 692–697.

[2] Act of 1797, ch. 20, § 6, 1 U. S. Stats. at Large, 515.

from, and be made returnable to the court where the judgment was obtained.[1]

Whether execution may issue against the land of the defendant, cannot be said to be settled on authority.[2]

[1] Act of 1826, ch. 124, 4 U. S. Stats. at Large, 184.

[2] See ante, p. 699, n. 2.

CHAPTER X.

OF APPEALS.

SECTION I.

OF APPEALS FROM THE DISTRICT TO THE CIRCUIT COURT.

AN appeal lies from any final judgment or decree of the district court to the circuit court next to be holden in the district where such decree is rendered, when the matter in dispute, exclusive of costs, exceeds the sum or value of fifty dollars.[1]

The appeal must, it will be noticed, be made to the next circuit court,[2] and it has been held that an appeal may properly be entered at the term of the circuit court which is begun next after the entry of the decree in the district court, although the term of the district court during which the decree was entered, had not ended when the term of the circuit court began.[3]

This appeal must, unless there is a special rule of the court to the contrary, be taken in open court, and before the adjournment of the court without day.[4] But a party is not bound to appeal

[1] Act of 1803, ch. 40, § 2, 2 U. S. Stats. at Large, 244. The Supreme Court of the United States, in United States *v.* Nourse, 6 Pet. 470, 496, remarked that this act "made no alterations in the law of 1789, as it respects appeals to the circuit court, except in reducing the sum or matter in controversy from three hundred to fifty dollars." On the authority of this dictum Mr. Justice *Curtis*, in United States *v.* Certain Hogsheads of Molasses, 1 Curtis, C. C. 276, said a question respecting an appeal from the district to the circuit court must depend on the construction of the twenty-first section of the judiciary act of 1789. But if the two acts are only inconsistent to this extent, we do not see the necessity of relying on the former instead of on the latter act.

[2] United States *v.* Brig Glamorgan, 2 Curtis, C. C. 236.

[3] United States *v.* Certain Hogsheads of Molasses, 1 Curtis, C. C. 276.

[4] Norton *v.* Rich, 3 Mason, 443. The forty-fifth Admiralty Rule provides that "All

till the decree is regularly drawn up and entered, and if it is not drawn up till vacation the court cannot have it entered as of the preceding term, but should continue it till the next term, as unfinished business.[1]

The forty-fifth admiralty rule allows, as we have seen, the district courts to provide rules for the regulation of the time of appeals, and also allows the court to make a special order in a particular case. By an old rule of the district court in Massachusetts, appeals might be claimed at any time within ten days after the decree was entered. The practice under this rule in the district court was to include Sundays within the ten days; but in one case where the appeal was refused because not claimed within ten days including Sundays, Mr. Justice *Woodbury*, in the circuit court, held that it should have been allowed, and on appeal, the supreme court were equally divided.[2] To settle the matter, the district court made a new rule in accordance with their former practice, including Sundays within the ten days.

If the appellant deserts his appeal the circuit court may remit the case to the district court, or may retain it and affirm the decree of the district court.[3]

If an appeal is wrongfully disallowed in the district court, the appellant may file a transcript of the record in the circuit court and move the court for leave to enter the appeal,[4] or, if necessary in order to prevent the district court from carrying its decree into effect, he may apply to the circuit court for a mandamus, commanding the district court to allow the appeal. The writ of mandamus in such a case should be directed to the judge of the district court, and not to the clerk thereof.[5]

The duty of the clerk of the district court, and the manner of making up the record in case of an appeal, are set forth in the fifty-third admiralty rule, which we give in the Appendix.

appeals from the district to the circuit court must be made while the court is sitting, or within such other period as shall be designated by the district court by its general rules or by an order specially made in the particular case."

[1] Steamboat New England, 3 Sumner, 495.

[2] Reed *v.* Peck, United States Sup. Ct. Dec. T. 1852. This case has never been reported.

[3] Privateer Montgomery *v.* Schooner Betsey, 1 Gallis. 416.

[4] The Enterprise, 2 Curtis, C. C. 317.

[5] The Steamboat New England, 3 Sumner, 495, See Smith *v.* Jackson, 1 Paine, C. C. 453.

SECTION II.

OF APPEALS FROM THE CIRCUIT TO THE SUPREME COURT.

The act of 1803,[1] which changed the mode of carrying up a suit in admiralty from the circuit to the supreme court, from a writ of error to an appeal,[2] provides that "such appeals shall be subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error." This last clause has been held by the supreme court[3] to have reference to the rules, etc., applicable to writs of error by the Judiciary Act.[4]

An appeal may be taken at any time within five years after the decree is rendered. But in order that it may operate as a supersedeas the appeal must be taken[5] and a copy of it lodged in the clerk's office for the adverse party,[6] and the appeal bond filed within the ten days specified in the act.[7] The obligation of the bond is such that the appellant must prosecute the appeal,

[1] Act of 1803, ch. 40, § 2, 2 U. S. Stats. at Large, 244.

[2] The San Pedro, 2 Wheat. 132. The various questions growing out of the partial repeal of the judiciary act by the act of 1803, are discussed in this case at length; and the court held that an admiralty case could not, since the passage of the act of 1803, be taken up by a writ of error.

[3] The San Pedro, 2 Wheat. 132.

[4] Act of 1789, ch. 20, § 22, 23, 1 U. S. Stats. at Large, 84. These sections provide generally that a cause may be heard on writ of error in the supreme court provided the party files an authenticated transcript of the record, and gives the adverse party thirty days' notice by a citation signed by a judge of the circuit court or justice of the supreme court. Writs of error must be brought within five years after the judgment complained of is rendered or passed, unless the person entitled to such writ is an infant, *feme covert*, *non compos mentis*, or imprisoned, in all which cases five years are allowed exclusive of such disability. But in order to make the writ of error operate as a supersedeas, a copy must be lodged for the adverse party in the clerk's office, where the record remains, within ten days, Sundays exclusive, after the judgment is rendered, or the decree passed, which is complained of. And in any case where a writ of error may operate as a supersedeas, no execution shall issue during the ten days.

[5] In Thompson *v.* Voss,'1 Cranch, C. C. 108, it was held that a writ of error was not a supersedeas unless it was served within ten days after the rendition of the judgment, although the parties had agreed to a stay of execution for two months, and the writ of error had been served before the expiration of that time.

[6] Act of 1789, ch. 20, § 23. See also, Wood *v.* Lide, 4 Cranch, 180.

[7] Adams *v.* Law, 16 How. 144; Hudgins *v.* Kemp, 18 How. 530.

and answer all damages and costs if he fail to make the appeal good.[1] The word damages does not mean damages for the delay, but the penalty must be sufficient to cover the whole amount of the judgment.[2] All the appellants should join in the appeal, though they need not join in the bond.[3]

The law presumes that the judge granting the appeal has attended to his duty, and it need not, therefore, appear affirmatively that the bond was given.[4] But if the transcript shows that no bond was given the appeal will be dismissed.[5]

If the inferior court issues an execution notwithstanding the appeal, the supreme court may issue a supersedeas, if the appellant was entitled to one in the inferior court.[6] But the appeal cannot operate as a supersedeas unless it is properly taken within the ten days. If, therefore, an appeal is taken and a bond filed, and the appeal is afterwards dismissed because of some informality in another respect, and then another appeal is taken and sufficient security offered, the appellant is not entitled to a supersedeas.[7]

If, after the decree is pronounced, the inferior court suspends the operation of it, as by entertaining a petition to open it, the ten days do not begin to run till the decree is finally entered.[8]

If the citation or appeal is not intended to operate as a supersedeas the appellant need only give security to such an amount as shall in the opinion of the judge who takes the same, be sufficient to answer all such costs as upon affirmance of the decree may be adjudged to the appellee.[9]

An appeal need not be in writing or taken in court.[10] If it

[1] Act of 1789, ch. 20, § 22, 1 U. S. Stats. at Large, 85.

[2] Stafford *v.* Union Bank of La. 16 How. 135; Catlett *v.* Brodie, 9 Wheat. 553.

[3] Brockett *v.* Brockett, 2 How. 238.

[4] Martin *v.* Hunter, 1 Wheat. 304, 361.

[5] Boyce *v.* Grundy, 6 Pet. 777.

[6] Stockton *v.* Bishop, 2 How. 74.

[7] Hogan *v.* Ross, 11 How. 294.

[8] Brockett *v.* Brockett, 2 How. 238. See also, Wylie *v.* Coxe, 14 How. 1.

[9] Act of 1794, ch. 3, 1 U. S. Stats. at Large, 404.

[10] Hudgins *v.* Kemp, 18 How. 530, 537. In England the practice was formerly, after a party had appealed, for him to pray "apostles" from the judge, i. e., short letters dismissory, signed by the judge, stating shortly the case and sentence, etc. 2 Browne, Civ. & Adm. Law, 438. The word "apostles" is also used in one of the circuit court rules in New York, 1 Blatchf. C. C. 660.

is taken in open court no citation is necessary.[1] If not taken in open court a citation signed by the judge of the circuit court or by a justice of the supreme court must be issued, citing the adverse party to appear at the supreme court on the first day of the next succeeding term.[2] If the appeal is taken after the commencement of the term of the supreme court, the appellant is not bound to file the record until the next term, and until the record is filed, the court cannot order the appeal to be dismissed.[3]

The citation must be signed by the judge, and not by the clerk,[4] and it should name all the parties to the suit,[5] and it should be served before the commencement of the term,[6] and it has been said that if thirty days will not elapse before the commencement of the term, the respondent is not obliged to be ready for the argument before the thirty days have elapsed.[7] And in 1803, a rule was passed to this effect, but this rule is omitted in the new rules, and there seems to be no rule which applies to this case.[8]

The citation should, we presume, be served personally, either on the appellee or his attorney of record, and the latter cannot, after the decision in the court below is given, withdraw his name

[1] Reily *v.* Lamar, 2 Cranch, 344; Brockett *v.* Brockett, 2 How. 238.

[2] Hamilton *v.* Moore, 3 Dall. 371; Villabolos *v.* United States, 6 How. 81; United States *v.* Curry, 6 How. 106; Steamer Virginia *v.* West, 19 How. 182.

[3] Stafford *v.* Union Bank of Louisiana, 16 How. 135.

[4] United States *v.* Hodge, 3 How. 534; Villabolos *v.* United States, 6 How. 81, 90.

[5] Smyth *v.* Strader, 12 How. 327. In Louisiana it is the practice for the name of the husband to be put in the petition when a suit is brought by the wife. This is done to signify the assent of the husband to the suit, but he is not considered a party to it, and is not responsible for costs. Under these circumstances it has been held that calling in the citation one of the parties A. B. wife of C. D., when she was wife of E. F. was not a fatal error. Peale *v.* Phipps, 8 How. 256.

[6] Yeaton *v.* Lenox, 7 Pet. 220.

[7] Lloyd *v.* Alexander, 1 Cranch, 365. See also, Wood *v.* Lide, 4 Cranch, 180. In Welsh *v.* Mandeville, 5 Cranch, 321, the court refused to take up a case without the consent of both parties, during the term, the citation not having been served thirty days before the commencement of the term.

[8] The sixteenth rule, passed in 1803, 1 How. xxvi, provided that when the writ of error issued within thirty days before the meeting of the court, the defendant in error could enter his appearance and proceed to trial, otherwise the cause must be continued. The ninth rule, of 1858, which provides for the manner of docketing and dismissing causes, which we cite post, p. 765, makes no provision for this case, nor do any of the rules upon which it was founded. The old rules are revised and corrected in 21 How., and renumbered, but they are not expressly repealed, and the rule of 1803 may yet be in force.

to avoid service.[1] And in one case where a female married after judgment, it was held that the service of the citation upon her husband was sufficient.[2] The appellee should, if no citation is served upon him, or if one is served in any way irregularly, at the term when the appeal is entered, move that the appeal be dismissed, because if an appearance is entered for him, and no motion is made at that term, the irregularity will be considered as waived.[3]

The issue and service of the citation form no part of the record of the court below, and may be proved *aliunde*.[4]

Where the record states the appeal to have been made in open court, no evidence is admissible *dehors* the record to show the contrary, but the proper course is, if the record is incorrect or defective to obtain a correct record on a *certiorari*.[5]

An appeal may be taken, as we have seen, at any time within five years, after the decree is rendered in the court below, and it has been held in the case of a writ of error that the writ must be filed in the supreme court before the expiration of that time, although it is issued from the circuit court in season.[6] Whether the same construction would apply to an appeal may perhaps be doubted; and in one case it was held that an appeal prayed for and allowed within five years was valid, although the security was not given until after that time, the mode of taking the security and of perfecting it being considered to be within the discretion of the court below.[7] If the suit is dismissed for any irregularity in the manner of taking the appeal, another appeal may be taken at any time within the five years, but this appeal must be

[1] United States *v.* Curry, 6 How. 106.

[2] Fairfax *v.* Fairfax, 5 Cranch, 19.

[3] McDonogh *v.* Millandon, 3 How. 693; Buckingham *v.* McLean, 13 How. 150.

[4] Innerarity *v.* Byrne, 5 How. 295. See also, Hudgins *v.* Kemp, 18 How. 530, 537.

[5] Hudgins *v.* Kemp, 18 How. 530. To obtain a *certiorari* for a diminution of the record, a motion must be made in writing, and the facts on which it is founded must, if not admitted by the other party, be verified by affidavit. And all motions for *certiorari* must be made at the first term of the entry of the cause; otherwise the same will not be granted unless upon special cause shown to the court, satisfactorily accounting for the delay. Rule 14, 21 How. x.

[6] Brooks *v.* Norris, 11 How. 204.

[7] The Dos Hermanos, 10 Wheat. 306. It would seem from this case that the case could not have been entered in the supreme court until after the expiration of the five years. And we think it clear that an appeal taken any time within the five years is valid.

prosecuted at the term of the supreme court next succeeding such appeal.[1]

But if an appeal has been dismissed, the same case cannot be docketed again without another appeal.[2]

The mode of entering cases in the supreme court, and the effect of a desertion of an appeal we have before considered,[3] and only remark here that the rule of 1853 has been altered in some respects by a rule passed at the December term, 1858, which we give in the Appendix, instead of the rule of 1853.

Besides the bond given in the circuit court the appellant is obliged to give to the clerk of the supreme court a bond with competent security to secure his fees, in the penalty of two hundred dollars, or a deposit of that amount to be placed in the bank subject to his draft.[4] By a rule passed in 1823,[5] it was provided that no cause would be afterwards heard until a complete record, containing in itself, without references *aliunde*, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in the supreme court, should be filed. By an act of 1853, it was declared that in equity and admiralty causes only such orders and memorandums as may be necessary to show the jurisdiction of the court and the regularity of the proceedings shall be entered on the final record; and in case of an appeal, copies of the proofs, and of such entries and papers on file as may be necessary on hearing of the appeal, may be certified up to the appellate court.[6] The rule of 1823 is, however, reënacted by the eighth new rule of 1858.[7] Some other peculiarities of practice in the supreme court may be found in their general rules, which are printed in the 21st of Howard.

[1] Yeaton *v.* Lenox, 8 Pet. 123; United States *v.* Curry, 6 How. 106; Hogan *v.* Ross, 11 How. 294; Steamer Virginia *v.* West, 19 How. 182.

[2] Rogers *v.* Law, 21 How. 526.

[3] See ante, p. 532.

[4] Rule 10, 21 How. viii. In Owings *v.* Tiernan, 10 Pet. 24, a motion was made to docket the cause, and at the same time a motion was made to dismiss it because no bond was filed. The court allowed the cause to be docketed and granted further time to the parties in which to file the bond. But if the bond is not filed at the first term, although the court will allow the cause to be entered at a subsequent term, yet they will not allow it to be entered as of the former term, although both parties consent to its being done. Van Rensselaer *v.* Watts, 7 How. 784.

[5] Thirty-first Rule, 1 How. xxxi.

[6] Act of 1853, ch. 80, § 1, 10 U. S. Stats. at Large, 163.

[7] 21 How. vii.

APPENDIX.

party arrested by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered there in the court, to which the process is returnable or in any appellate court. And upon such bond or stipulation, summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable to enforce the final decree so rendered, or upon appeal, by the appellate court.

IV.

In all suits *in personam*, where goods and chattels, or credits and effects are attached under such warrant authorizing the same, the attachment may be dissolved by order of the court to which the same warrant is returnable, upon the defendant, whose property is so attached, giving a bond or stipulation with sufficient sureties to abide by all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court; and upon such bond or stipulation, summary process of execution shall and may be issued against the principal and sureties by the court to which such warrant is returnable, to enforce the final decree so rendered, or upon appeal, by the appellate court.

V.

Bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before any commissioner of the court, who is authorized by the court to take affidavits of bail and depositions in cases pending before the court.

VI.

In all suits *in personam*, where bail is taken, the court may, upon motion for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor: and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid, if either of the sureties shall become insolvent pending the suit, new sureties may be required by the order of the court to be given, upon motion and due proof thereof.

VII.

In suits *in personam*, no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court upon affidavit or other proper proof showing the propriety thereof.

VIII.

In all suits *in rem* against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances, if such tackle, sails, apparel, furniture, boats, or other appurtenances are in the possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the custody of the marshal or other proper officer, if upon the hearing the same is required by law and justice.

IX.

In all cases of seizure and in other suits and proceedings *in rem*, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested, and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody; and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order, and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

X.

In all cases where any goods or other things are arrested, if the same are perishable, or are liable to deterioration, decay, or injury by being detained in custody, pending the suit, the court may, upon the application of either party, in its discretion order the same, or so much thereof to be sold, as shall be perishable or liable to depreciation, decay, or injury, and the proceeds or so much thereof as shall be a full security to satisfy in decree to be brought into court, to abide the event of the suit; or the court may, upon the application of the claimant, order a delivery thereof to him upon a due appraisement to be had under its direction, either upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation with the sureties in such sum as the court shall direct to abide by and pay the money awarded by the final decree rendered by the court or the appellate court, if any appeal intervenes, as the one or the other course shall be ordered by the court.

XI.

In like manner where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon a due appraisement to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his

XXII.

All informations and libels of information upon seizures for any breach of the revenue or navigation or other laws of the United States, shall state the place of seizure, whether it be on land, or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States; and the district within which the property is brought and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture and to give notice to all persons concerned in interest to appear and show cause at the return-day of the process why the forfeiture should not be decreed.

XXIII.

All libels in instance causes, civil or maritime, shall state the nature of the cause, as for example, that it is a cause civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be, and if the libel be *in rem*, that the property is within the district; and if *in personam*, the names and occupations and places of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegation of facts, upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer of the process to enforce his rights *in rem*, or *in personam* (as the case may require), and for such relief and redress as the court is competent to give in the premises. And the libellant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof.

XXIV.

In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time on motion to the court as of course. And new counts may be filed and amendments in matters of substance may be made upon motion at any time before the final decree upon such terms as the court shall impose. And where any defect of form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libellant.

XXV.

In all cases of libels *in personam*, the court may in its discretion, upon the appearance of the defendant, where no bail has been taken and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation with sureties in such sum as the court shall direct, to pay all costs and expenses, which shall be awarded against him in the suit upon the final adjudication thereof, or by any interlocutory order in the process of the suit.

XXVI.

In suits *in rem*, the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant, by whom or on whose behalf the claim is made, is the true and *bonâ fide* owner, and that no other person is the owner thereof. And where the claim is put in by an agent or consignee, he shall also make oath, that he is duly authorized thereto by the owner, or if the property be at the time of the arrest in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And upon putting in such claim, the claimant shall file a stipulation with sureties in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or upon an appeal, by the appellate court.

XXVII.

In all libels in causes of civil and maritime jurisdiction, whether *in rem* or *in personam*, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation;[1] and the answer shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel; and shall also answer in like manner each interrogatory propounded at the close of the libel.

XXVIII.

The libellant may except to the sufficiency or fulness or distinctness or relevancy of the answer to the articles and interrogatories in the libel; and if the court shall adjudge the same exceptions or any of them to be good and valid, the court shall order the defendant forthwith within such time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable.

[1] This does not apply to cases where the sum or value in dispute does not exceed $50, unless the judge of the district court shall, for the purposes of justice, so prescribe. See post, p. 762.

XXIX.

If the defendant shall omit or refuse to make due answer to the libel upon the return-day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default, and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the cause ex parte and adjudge therein as to law and justice shall appertain. But the court may in its discretion set aside the default, and upon the application of the defendant, admit him to make answer to the libel at any time before the final hearing, and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor.

XXX.

In all cases where the defendant answers, but does not answer *fully* and explicitly and distinctly to all the matters in any article of the libel, and exception is taken thereto by the libellant, and the exception is allowed, the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken *pro confesso* against the defendant to the full purport and effect of the article to which it purports to answer, and as if no answer had been put in thereto.

XXXI.

The defendant may object by his answer to answer any allegation or interrogatory contained in the libel which will expose him to any prosecution or punishment for a crime, or for any penalty or any forfeiture of his property for any penal offence.

XXXII.

The defendant shall have a right to require the personal answer of the libellant upon oath or solemn affirmation to any interrogatories which he may at the close of his answer propound to the libellant, touching any matters charged in the libel, or touching any matter of defence set up in the answer, subject to the like exception as to matters which shall expose the libellant to any prosecution or punishment or forfeiture as is provided in the 31st Rule. In default of due answer by the libellant to such interrogatories, the court may adjudge the libellant to be in default and dismiss the libel, or may compel his answer in the premises by attachment, or take the subject-matter of the interrogatory *pro confesso* in favor of the defendant, as the court in its discretion shall deem most fit to promote public justice.

XXXIII.

Where either the libellant or the defendant is out of the country, or unable from sickness or other casualty to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may in its discretion, in furtherance of the due administration of justice dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.

XXXIV.

If any third person shall intervene in any cause of admiralty and maritime jurisdiction *in rem*, for his own interest, and he is entitled, according to the course of admiralty proceedings, to be heard for his own interest therein, he shall propound the matter in suitable allegations, to which if admitted by the court, the other party or parties in the suit may be required by order of the court to make due answer; and such further proceedings shall be had and decree rendered by the court therein as to law and justice shall appertain. But every such intervenor shall be required, upon filing his allegations, to give a stipulation with sureties to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court.

XXXV.

Stipulations in admiralty and maritime suits may be taken in open court, or by the proper judge at chambers, or under his order, by any commissioner of the court, who is a standing commissioner of the court, and is now by law authorized to take affidavits of bail, and also depositions in civil causes pending in the courts of the United States.

XXXVI.

Exception may be taken to any libel, allegation or answer for surplusage, irrelevancy, impertinence or scandal, and, if upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged at the cost and expense of the party in whose libel or answer the same is found.

XXXVII.

In cases of foreign attachment, the garnishee shall be required to answer on oath or solemn affirmation, as to the debts, credits or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect

so to do, the court may award compulsory process *in personam* against him. If he admit any debts, credits or effects, the same shall be held in his hands liable to answer the exigency of the suit.

XXXVIII.

In cases of mariners' wages, or bottomry, or salvage, or other proceedings *in rem*, where freight, or other proceeds of property are attached to, or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shown, the court may order the same to be brought into court to answer the exigency of the suit, and upon failure of the party to comply with the order, may award an attachment or other compulsive process to compel obedience thereto.

XXXIX.

If in any admiralty suit, the libellant shall not appear and prosecute his suit according to the course and orders of the court, he shall be deemed in default and contumacy, and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.

XL.

The court may in its discretion, upon the motion of the defendant and the payment of costs, rescind the decree in any suit in which on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof, at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct.

XLI.

All sales of property under any decree in admiralty shall be made by the marshal or his deputy or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.

XLII.

All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the

name of the court, and shall not be drawn out except by a check or checks signed by a judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book containing a memorandum and copy of all the checks so drawn and the date thereof.

XLIII.

Any person having an interest in any proceeds in the registry of the court, shall have a right by petition and summary proceeding to intervene *per interesse suo*, for a delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice; and if such petition or claim shall be deserted, or upon a hearing be dismissed, the court may in its discretion award costs against the petitioner in favor of the adverse party.

XLIV.

In cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit to one or more commissioners to be appointed by the court to hear the parties and make report therein. And such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in references to them, including the power to administer oaths to and examine the parties and witnesses touching the premises.

XLV.

All appeals from the district to the circuit court must be made while the court is sitting, or within such other period as shall be designated by the district court by its general rules, or by an order specially made in the particular suit.

XLVI.

In all cases not provided for by the foregoing rules, the district and circuit courts are to regulate the practice of the said courts respectively, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty.

XLVII.

These rules shall be in force in all the circuit and district courts of the United States from and after the first day of September next. [1845.]

It is ordered by the court, That the foregoing rules be and they are adopted and promulgated as Rules for the regulation and government of the practice of the circuit courts and district courts of the United States in suits in admiralty on the instance side of the courts. And that the reporter of the court do cause the same to be published in the next volume of his reports; and that he do cause such additional copies thereof to be published, as he may deem expedient for the due information of the bar and bench in the respective districts and circuits.

ADDITIONAL ADMIRALTY RULES.

DECEMBER TERM, 1850. 10 HOWARD, v.

Ordered, that the following supplemental rules be added to the rules heretofore adopted by this court for regulating proceedings in admiralty.

In all suits *in personam*, where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the State, where an arrest is made upon similar or analogous process issuing from the State courts. And imprisonment for debt on process issuing out of the admiralty court is abolished in all cases where by the laws of the State in which the court is held imprisonment for debt has been or shall be hereafter abolished upon similar or analogous process issuing from a State court.

The twenty-seventh rule shall not apply to cases where the sum or value in dispute does not exceed fifty dollars exclusive of costs, unless the district court shall be of opinion that the proceedings prescribed by that rule are necessary for the purposes of justice, in the case before the court.

All rules and parts of rules heretofore adopted inconsistent with this order are hereby repealed and annulled.

DECEMBER TERM, 1851. 13 HOWARD, vi.

Ordered, that further proof, taken in a circuit court upon an admiralty appeal, shall be by deposition, taken before some commissioner appointed by a circuit court, pursuant to the acts of congress in that behalf, or before some officer authorized to take depositions by the thirtieth section of the act of congress of the 24th of September, 1789, upon an oral examination

and cross-examination, unless the court in which such appeal shall be pending, or one of the judges thereof, shall, upon motion, allow a commission to issue to take such deposition upon written interrogatories and cross-interrogatories. When such deposition shall be taken by oral examination, a notification from the magistrate before whom it is to be taken, or from the clerk of the court in which such appeal shall be pending, to the adverse party, to be present at the taking of the same, and to put interrogatories if he think fit, shall be served on the adverse party or his attorney, allowing time for their attendance after being notified, not less than twenty-four hours, and, in addition thereto, one day, Sundays exclusive, for every twenty miles' travel.

Provided, that the court in which such appeal may be pending, or either of the judges thereof, may, upon motion, increase or diminish the length of notice above required.

Ordered, that, when oral evidence shall be taken down by the clerk of the district court, pursuant to the above-mentioned section of the act of congress, and shall be transmitted to the circuit court, the same may be used in evidence on the appeal, saving to each party the right to take the depositions of the same witnesses, or either of them, if he should so elect.

DECEMBER TERM, 1854. 17 HOWARD, vi.

Ordered, that the following supplemental rules be added to the rules heretofore adopted by this court, for regulating proceedings in admiralty.

RULE NO. LII.

When the defendant in his answer, alleges new facts, these shall be considered as denied by the libellant, and no replication, general or special, shall be allowed. But within such time after the answer is filed as shall be fixed by the district court, either by general rule or by special order, the libellant may amend his bill, so as to confess and avoid, or explain or add to the new matters set forth in the answer; and within such time as may be fixed in like manner, the defendant shall answer such amendments.

RULE NO. LIII.

The clerks of the district courts shall make up the records to be transmitted to the circuit courts, on appeals, so that the same shall contain the following: —

1. The style of the court.

2. The names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place.

3. If bail was taken, or property was attached or arrested, the process of arrest or attachment, and the service thereof, all bail and stipulations, and if any sale has been made, the orders, warrants, and reports relating thereto.

4. The libel, with exhibits annexed thereto.

5. The pleadings of the defendant, with the exhibits annexed thereto.

6. The testimony on the part of the libellant, and exhibits not annexed to the libel.

7. The testimony on the part of the defendant, and any exhibits not annexed to his pleadings.

8. Any order of the court to which exception was made.

9. Any report of an assessor or assessors if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made and so much of the report as shows what results were arrived at by the assessor, are to be stated.

10. The final decree.

11. The prayer for an appeal and the action of the district court thereon, and no reasons of appeal shall be filed or inserted in the transcript.

The following shall be omitted: —

1. The continuances.

2. All motions, rules, and orders not excepted to, which are merely preparatory for trial.

3. The commissions to take depositions, notices therefor, their captions and certificates of their being sworn to, unless some exception to a deposition in the district court was founded on some one or more of these; in which case so much of either of them as may be set out. In all other cases it shall be sufficient to give the name of the witness, and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where, and the date when, the deposition was sworn to. And in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

The clerk of the district court shall page the copy of the record thus made up, and shall make an index thereto; and he shall certify the entire document, at the end thereof, under the seal of the court, to be a transcript of the record of the district court in the cause named at the beginning of the copy made up, pursuant to this rule; and no other certificate of the record shall be needful or inserted.

It is further ordered, that these rules be published in the next volume of the reports of the decisions of this court, and that the clerk cause them to be forthwith printed and transmitted to the several district courts.

JANUARY 22, 1855.

General Rule, No. 9.

DECEMBER TERM, 1859. 21 Howard.

[This rule has changed in some respects the sixty-third rule, passed December term, 1853, 16 Howard. The changes are indicated in the notes.]

First. In all cases where a writ of error or an appeal shall be brought to this court from any judgment or decree rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant, as the case may be, to docket the cause, and file the record thereof with the clerk of this court within the first six days of the term; and if the writ of error or appeal shall be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the cause and file the record thereof with the clerk of this court within the first thirty days of the term; and if the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the case docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the cause and certifying that such writ of error or appeal has been duly sued out and allowed.

And in no case shall the plaintiff in error or appellant be entitled to docket the cause and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.[1]

Second. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of the court; and if the case is docketed and a copy of the record filed with the clerk of this court, by the plaintiff in error or appellant,[2] within the periods of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter during the term the case shall stand for argument at the term.

Third. In all cases where the period of thirty days is mentioned in this rule, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Washington, New Mexico, and Utah.

District Court Rules in Admiralty. Massachusetts District.

In cases in admiralty in which an appeal is permitted by law, an appeal

[1] In the sixty-third rule, the words "or consent of the opposite party," were added.

[2] In the sixty-third rule this sentence read "by either party within the periods of time above limited and prescribed by this rule, the case shall stand for argument at the term."

may be claimed at any time within ten days, Sundays inclusive, from the time of entering up the final decree, and not afterwards, unless the court for cause shown, shall prescribe a longer or shorter time.

ADMIRALTY RULE, ADOPTED JUNE 27th, 1855.

In suits *in personam*, where the defendant cannot be legally arrested, the mesne process may be a warrant to attach his goods and chattels to the amount sued for, or if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein, or by a simple monition in the nature of a summons to appear and answer to the suit as the libellant shall in his libel or information pray for or elect.

FORMS.

MUCH space is generally devoted in works on Admiralty Practice to forms of libels and answers; but this, we think, is, to a great extent, unnecessary. The narrative part of each libel depends so much on the particular facts of the case, that no form can be literally followed, and the commencement and close of all libels and answers are so similar to each other, that we do not deem it necessary to give more than one form, and then state the peculiarities of the different causes of action.

The libel is generally entitled

UNITED STATES OF AMERICA, }
——— District. } ss.

To the Honorable ——— Judge of the District Court of the United States, within and for the District of ———.

According to the forms given in Dunlap's Admiralty Practice, and which are generally followed in Massachusetts, the libel begins as follows: "The libel and complaint of A. B. of ———, in the district aforesaid,[1] in a cause of contract.[2] And thereupon this libellant alleges and articulately propounds as follows."

This form of commencement is, perhaps, not strictly grammatical, and we prefer the form which seems to be in use in other districts, and which we have known used in Massachusetts. This omits the clause, "And

[1] If the libel is *in rem* it must state that the property is within the district, and if it is *in personam*, the names and occupations and places of residence of the parties must be stated. 23d Admiralty Rule.

[2] Or of tort, or damage, or of salvage, or of possession, or otherwise, as the case may be. 23d Admiralty Rule.

thereupon your libellant," etc., and adds the words "alleges as follows." Thus making the libel allege instead of leaving the nominative without a predicate.

Another form is: A. B. of ———, exhibits this his libel, etc. And thereupon the said A. B. alleges and articulately propounds as follows.

The following pleadings in a suit *in rem* against a vessel for non-delivery of goods, will serve as a guide for all cases of contract. After one of the above headings, the libel would proceed as follows:

First. That on the ——— day of ———, 185 , the said ship, whereof A. B. was master, being then in the port of ———, bound on a voyage upon the high seas, and on waters within the admiralty and maritime jurisdiction of the United States and of this honorable court, to wit, from the said port of ——— to ——— the libellant (or here give the name of the shipper of the goods, if the libellant is not the shipper) being the owner of certain goods (describe them), shipped them on board the said vessel in good order and well-conditioned, to be carried and transported in said ship to the said ———, and there to be delivered to your libellant, or his assigns, in like good order, dangers of the sea only excepted, for the freight of ———; with ——— per cent. primage and average accustomed, to be paid by your libellant or his assigns. And the said ———, master as aforesaid, at the said port of ———, received said merchandise, and on the ——— day of ———, in the year aforesaid, signed two bills of lading, and delivered the same to the shipper of said merchandise. (Copies of the bills of lading should be annexed.)

Second. That on or after the said ——— day of said ———, the said ship sailed from the port of ——— for the said port of ———, at which port she duly arrived and now is; but notwithstanding your libellant has been at all times and still is ready to receive the whole of said merchandise in good order, and on so receiving the same, to pay the freight and charges thereon, according to the tenor and effect of the said bills of lading, yet ——— of the value of ——— dollars, part of the said ———, shipped as aforesaid, the said master has not yet delivered, but refuses so to do, and owing to the negligent, improper, and careless manner in which the said ——— were partially transported, and for want of proper care on the part of said master and persons employed by him, the said ——— were thrown into the water by the bursting of the boiler, or some portion of the steam apparatus of the steam-lighter, which your libellant avers was not a danger of the sea, wherein the said ———, master as aforesaid, was transporting said ——— from the shore at said port of ——— to said ship.[1] By reason of which said casting of said

[1] Or, if the goods are delivered in a damaged condition, it is sufficient to state this fact, setting forth the nature and extent of the damage, and the burden of proof is then on the respondent to show the cause of the injury.

goods into the water, as aforesaid, the said master did not transport to said port of ——— the said (describe the goods not delivered) and has so informed your libellant. By reason of which non-performance of the terms of said contract, as set forth in said bills of lading, on the part of said master, as hereinbefore set forth, your libellant has sustained damage to the amount of ——— dollars.

Third. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore the libellant prays that process in due form of law, according to the course of this court in cases of admiralty and maritime jurisdiction, may issue against the said vessel, her tackle, apparel, and furniture, and that all persons claiming any interest therein, may be cited to appear and answer all and singular the matters aforesaid, and that this honorable court would be pleased to decree the payment of the damages aforesaid, with costs; and that the said vessel may be condemned and sold to pay the same, and that the libellant may have such other and further relief in the premises as in law and justice he may be entitled to receive.

A. B.

——— ———, *Proctor for libellant.*

A second count might be filed in such a case, declaring on an agreement to carry the goods by the respondents, independent of the contract of which the bill of lading is the evidence.

The claim may be as follows:—

UNITED STATES OF AMERICA:
District Court of the United States. ——— District.

IN ADMIRALTY.

——— Libellants, *versus* Ship ———.

And now comes before said court, ———, of ———, in the district of ———, and CLAIMS that the said ship ——— is owned by him the said ———, and (state names of owners) all of ———, in the district of ———, and that according to his best knowledge and belief, no other person is owner thereof: and that he, the said ———, is the agent of the said other owners of said ship, duly authorized to make this claim.

Wherefore he prays that said ship and appurtenances may be delivered to him, upon his entering into such stipulations therefor as this honorable court shall order in the premises.

(Signed.) ——— ———.

——— District, ss. (Date.)

Sworn to by said ———, before me,

——— ———.

ANSWER.

To the Honorable ———, Judge of the District Court of the United States for the District of ———.

The answer of ———, of ———, ———, part-owner of the ship called the ———, to the libel of ——— against said ship.

First. This respondent says that in the month of December last, the said ship ——— was lying in said port of ———, bound for ———, and that the libellant proposed and agreed to ship on board thereof (describe the goods), upon the terms of freight mentioned in the said libel, to be transported and delivered to the libellants, the dangers of the seas only excepted. But this respondent denies that the whole amount of said goods was ever shipped on board of said vessel, or any larger amount than ———, which have been transported and duly delivered to the libellants, besides ——— hereinafter mentioned, which have been tendered to the libellants or their agent.

Second. This respondent says that there are no wharves at ——— where vessels of the size of the ——— can lie, and that the merchandise to be laden on board of such vessels is taken to them on board of lighters propelled by steam, and that on the 20th day of said December, certain goods, being part of those agreed to be shipped, were put on board of a steam lighter called the ———, and while the same were on board thereof, the boiler thereof exploded, and the said goods were thrown into the water, of which part were saved in a wet and damaged condition, in consequence of which it was necessary and expedient to sell them, and they were sold; part were afterwards put on board of the ——— and brought to ———, and have been delivered or tendered to the libellants; part are in the hands of the agent of the libellants in ———, for account of the libellants, and the rest were lost: the said goods being those referred to in the said libel as having been shipped on board of the said ship, and not delivered, which said shipment your respondent denies ever to have been made.

Third. This respondent says that the said steam lighter ———, was a steamer regularly qualified and certified for such business, duly licensed and constantly employed therein, and that so far as this respondent knows or believes, and as he alleges, was fit, suitable, and proper for such employment, and what is there termed bay-worthy; and if she was not, which the respondent does not admit but denies, he still insists that the owners of said ship are not in anywise responsible therefor, or liable for any loss which may happen to goods on board thereof intended to be laden on board of the said ship, and being transported thereto; but insists that during the time of such transportation, such goods are at the risk of

the owners thereof, and are so considered by the usage of merchants, and that insurance is always made thereon by the owners to cover the same while on board of lighters, and that the said goods were insured on behalf of the libellants against the risk of lighterage, and that the insurers thereon had paid or agreed to pay the loss thereon, and that this libel is promoted for their benefit and at their expense.

Fourth. This respondent further answering says: that the employment of steam lighters at said port of ——— is usual, necessary, and unavoidable, and that in such cases all perils peculiar and incident to that particular kind of navigation, are, and ought to be, deemed perils of the seas, for loss and damage, whereby the owners of ships are not and ought not to be held responsible, inasmuch as they cannot by any care or diligence on their part, or that of their servants, or agents, prevent or guard against the same, and that the owners of vessels are not, and ought not to be held bound to insure the owners of goods against such losses, or any want of care, negligence, or defect in the care, management, navigation, or construction of said steam lighters, because they have no control over the same. And this respondent insists, that if the owners of said ship were ever responsible for said goods, which he wholly denies, yet that they would not be responsible for any loss or damage thereto, by reason of the explosion of the boiler of a steam lighter, the same being a peril of the seas, incident to navigation, in said port.

Fifth. This respondent admits that after the said loss occurred, to wit, on said ———, the master of said ship signed two bills of lading, copies of which are annexed to the said libel, for a certain number of packages of goods, which included those on board of the said lighter at the time of the said explosion, and of which, fourteen only were on board of the said ship when said bills were signed. And this respondent alleges that the said bills were signed by said master under a mistaken idea that he was bound to do so because said goods had been put on board of the said lighter, and under the apprehension and threat that the vessel would be arrested and detained, and loss and damage incurred, if he refused to sign them. And your respondent alleges and insists, that the master of a ship has no authority to sign bills of lading for goods and merchandise, until the same are actually laden on board, and that the owners of vessels are not in anywise responsible on account of bills so signed, unless the goods are actually shipped on board thereof; and so the owners of said vessel are not liable for any loss or damage to said goods.

Sixth. This respondent further insists, that if the owners of vessels are liable on contracts for the transportation of goods made by the master before the goods are actually shipped on board of the vessel, which he does not admit but denies, yet that by the maritime law, the vessel itself is not and does not become liable and accountable therefor, until the

goods are actually laden on board thereof, and that no suit against the vessel can be maintained for any loss or damage thereto, unless the goods are on board thereof at the time when the same shall occur.

Seventh. This respondent denies that by reason of the matters and things alleged in said libel, the said libellants have sustained damage to the amount of ——— dollars, or any damage or loss for which said vessel is liable.

Wherefore this respondent prays that the said libel may be dismissed, and the said vessel restored to him, and for his costs.

A. B.

C. D. *Proctor.*

——— District (date).

Signed and sworn to, before me,

——— *U. S. Commissioner.*

We may remark that since the supreme court have decided that there is not admiralty jurisdiction over the domestic commerce of a State, it may be well to negative the fact in the libel, though we should not consider it essential.

Suit in rem *under Charter-party for non-delivery of Goods.*

A libel *in rem* under a charter-party against the vessel, for non-delivery of goods, would be very similar to the above, and the charter-party should properly be annexed together with the bills of lading, if any are given.

Suit in personam *for breach of Charter-party or of Contract of Affreightment.*

In a suit *in personam* for breach of either an ordinary contract of affreightment or under a charter-party, the libel should set forth that the respondents are owners of the vessel.

Suit in rem *for Freight.*

A libel *in rem* against goods for the freight due, should set forth the reception of the goods, the arrival of the ship, the notice to the consignee that the goods were ready for delivery, and that an opportunity for inspecting the goods was given, but that the consignee would not receive the goods, nor pay the freight, etc.

Suit in personam *for Freight.*

A libel *in personam* should, if against the owner of the goods, allege the performance of the contract by a delivery, or offer of delivery, and

if against the consignee, the libel should allege that the consignee had received the goods.

Suit in rem *for Repairs or Supplies.*

A libel *in rem* for repairs or supplies furnished a foreign vessel, should state that at the time the repairs were made, or supplies furnished, the vessel was not owned or enrolled in the State where the supplies were furnished and the repairs made. It should also represent that on a certain day the vessel being at a certain port within the admiralty and maritime jurisdiction of the United States, and being unseaworthy, or needing supplies or repairs, the libellant was requested by the master to repair the vessel, or furnish her with supplies, and that he did so. The repairs or supplies should be stated at length. It should also be alleged that the repairs or supplies were furnished on the credit of the ship, and were necessary and suitable, and that the amount due has not been paid.

Suit in personam *for Repairs or Supplies.*

Libels *in personam* against the master or owner, in cases of foreign or domestic vessels, are very similar to those *in rem*, and no difficulty will be found in drawing them.

Suits under Act of 1845.

Libels under the Act of 1845, conferring jurisdiction upon the district courts over the great lakes and navigable waters connecting the same, should state that the vessel is of twenty tons burden and upwards, that she was at the time enrolled and licensed for the coasting-trade, and employed in commerce between ports in different States and Territories upon the lakes or navigable waters connecting the same.

Suits for Wages.

In suits for mariners' wages, the voyage should be accurately described, and the hiring, the performance of duty, and the breach, should be fully set forth. The libel may also pray that the respondent be ordered to produce a copy of the shipping articles.

Suits on Bottomry Bonds.

A libel on a bottomry bond, if it is made by the master, should state the necessity which occasioned the giving of the bond, and that the master had no other means of procuring means to make the repairs. It should also allege the making of the bond, its terms, the departure of the vessel, and her safe arrival at the port where the bond was, by its terms, payable, and that the amount of the bond has not been paid. A copy of the bond should be annexed.

Suits for Salvage.

In libels for salvage, when the libellants are many in number, the names of the libellants may be inserted in a paper annexed. The libel should describe the position of the vessel or property saved, the danger it was in, with some minuteness of detail, and the services rendered.

Suits in causes of Collision.

The libel should set forth the ownership of the vessel, the voyage on which she was bound, and that she was sea-worthy and sufficiently provided with tackle, apparel, and furniture. It should then state the time and place of the accident as nearly as possible, the force and direction of the wind, the state of the weather, and the course the vessels were respectively steering. The position of the crew on deck in respect to the look-out, and all measures which were adopted to prevent the collision should also be stated. It should also aver that the collision and loss were caused wholly by the culpable carelessness and negligence of those on board the other vessel, and that they would not have happened if due caution and proper diligence had been used by those on board the colliding vessel, and that they were in no way caused by those on board the vessel injured. The damage done should then be stated, and if the suit is *in rem*, there should be an allegation that the property is within the jurisdiction of the court.

Suit in a cause of Damage for an Assault.

The libel should state the voyage on which the libellant was shipped, and that during the voyage he well and truly performed his duty, and obeyed all the lawful commands of the master and other officers on board the ship. Each injury received, or assault complained of, should be then set forth in a distinct article.

Possessory Suits.

In a possessory suit the libel should state the ownership of the vessel, setting forth the proportion owned by the libellant, and the reasons which entitle him to the possession, and there should be a prayer that all documents relating to the national character of the vessel, be delivered up to the libellant. The circumstances which may entitle the owner to the possession are so various, that no particular form can be given.

Petition for the Sale of the Vessel.

No particular form is necessary for this. The libel should set forth the facts *in extenso* which render the sale necessary, and pray that the court order the same to be made.

Suits against proceeds in the Registry.

These should be by petition, and should state the nature of the petitioner's demand, and should conclude with a prayer that the court will pronounce for the demand, and direct it to be paid out of the proceeds, and for such other relief as the petitioner is in right and justice entitled to, and as the court is competent to give. If a claimant has appeared, there should also be a petition that he be summoned to appear and show cause, if any he has, why the petition should not be granted.

ANSWERS.

The manner of beginning and ending answers in admiralty, will be seen from the form that we have before given. The same form will also show the manner of drawing the articles which state the defence, and for the matters which may be set up in defence, we refer to several subjects which we have considered in the body of our work.

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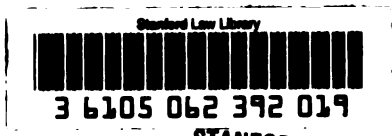
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